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JUSTICE MUGAMBI

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IN THIS ISSUE

6 Kenya's crucial crossroads amid the Finance Bill 2024 protests

9 The hesitant sentry: Unpacking Justice Mugambi’s injudicious judicial decision

17 Statement on allegations of abductions of protesters

18 In Memory of Hon. Monica Njoki Kivuti

23 Joint statement by the Kenya Magistrates and Judges Association

28 Press statement on abduction of Dr. Austin Omondi by LSK

30 Statement by the Organization of Commonwealth Caribbean bar Associations

31 Condemning the arrest, abduction and killing of civilians protesting the Finance Bill in Kenya

32 Statement from the Commonwealth Secretary-General, the Rt Hon Patricia Scotland KC, about the protests in Kenya

35 The parliament betrayal: When the ayes have it

39 The practicality of the right to recall legislators in Kenya

51 Ethnic tensions in Kenya cause for alarm

55 Proposing the recognition of a parent-child privilege under Kenyan evidence law

68 Insights into the business and human rights regime in Kenya

84 Political will as the key to the success of equalisation fund

92 Analysis of impacts of floods on persons with disabilities in Kenya

100 The dual mandate of the capital markets authority in relation to the rule against bias

112 Kenya's young voters have a dilemma: They dislike ethnic politics but feel trapped in it

115 The role of diplomacy and international law in Africa's SDG journey

123 Khat in Kenya: Why efforts to ban this popular stimulant are unlikely to work

126 A strategic approach to Africa's Sustainable Development Goals (SDGs)

EDITORIAL

Kenya's crucial crossroads amid the Finance Bill 2024 protests

Kenya is once again embroiled in significant civil unrest, driven this time by the Finance Bill 2024. This bill, which aims to enhance government revenue through new tax measures, has sparked widespread protests nationwide. Demonstrators fill the streets of Nairobi, Kisumu, Mombasa, and other major cities, demanding economic justice and greater transparency from their government.

The Finance Bill 2024 proposes several tax increases, including a rise in Value Added Tax (VAT), higher excise duties on fuel, and a new digital services tax. The government insists these measures are essential to manage the growing national debt and to fund vital infrastructure projects. However, many Kenyans view it as an added burden on a struggling population.

Economic strain on everyday Kenyans

The Covid-19 pandemic, rising inflation, and high unemployment rates have severely impacted Kenya's economy. For the average Kenyan, the proposed tax hikes will mean a higher cost of living, already stretching many households to their limits. The increase in VAT and fuel excise duties, in particular, is expected to lead to a rise in the prices of basic goods and services, making daily life even more expensive for ordinary citizens.

Voices of discontent

The protests reflect deep-rooted frustration with what many see as a disconnect between the government and the people. Citizens are questioning the logic of extracting more from taxpayers without corresponding transparency and accountability on how these funds will be used. Corruption scandals and the mismanagement of public funds have eroded trust in the government's ability to effectively utilise increased revenues.

One protester voiced a common sentiment: "We are tired of paying for the mistakes of our leaders. It's time for them to be accountable and stop making the poor pay for their mismanagement."

The dark side of law enforcement: Police killings and extrajudicial kidnappings during the Finance Bill 2024 in Kenya

The Finance Bill 2024 in Kenya has sparked intense public debate, primarily focused on its economic implications. However, the recent surge in police killings and extrajudicial kidnappings during the bill's contentious period has shifted the spotlight to a more pressing issue: the dark underbelly of law enforcement in the country.

Amidst public protests and political dissent, reports of police brutality have become disturbingly common. As citizens took to the streets to voice their discontent, the government's response has been marked by a heavy-handed crackdown on dissent.

The most alarming aspect of this crackdown has been the surge in police killings. Law enforcement agencies, ostensibly

Kenyan police have been criticised for their frequent use of excessive force during law enforcement operations, including protests and demonstrations. This has resulted in deaths and injuries among civilians, raising concerns about police tactics and training.

tasked with maintaining order, have been implicated in numerous incidents where peaceful protestors have been met with lethal force. This brutal suppression has not only resulted in loss of life but has also eroded public trust in the police force, highlighting a systemic issue within Kenya's law enforcement agencies.

In tandem with these killings, extrajudicial kidnappings have emerged as a sinister tactic employed to silence critics and dissenters. The brazen acts of kidnapping eerily remind us of the dark days of the vilified KANU regime under President Moi. Activists, journalists, and ordinary citizens have been abducted in broad daylight, only to resurface days later, often bearing signs of torture and intimidation. These kidnappings, shrouded in mystery and fear, have instilled a climate of terror, deterring many from speaking out against the government's actions.

The implications of these human rights violations extend beyond the immediate victims. They signal a dangerous precedent where the state resorts to unlawful measures to quell opposition, undermining democratic principles and the rule of law. The judiciary, already struggling with issues of independence and corruption, faces an additional burden as it attempts to address these abuses while under considerable political pressure.

International bodies and human rights organisations have condemned these actions, urging the Kenyan government to uphold its commitment to human rights and democratic governance. However, the response from authorities has been largely defensive, with official statements often downplaying the severity of the incidents or justifying them under the guise of national security.

Government's response and the path forward

The government's response to the protests has been varied. While some officials have called for dialogue and understanding, others have taken a firmer stance, stressing

Civil society organisations (CSOs) in Kenya are actively involved in advocacy and activism on issues such as human rights, governance, transparency, accountability, environmental conservation, gender equality, and social justice. They often work to hold the government and other institutions accountable for their actions.

the necessity of the bill for the country's economic health. Unfortunately, there have also been reports of police brutality and heavy-handed crackdowns on peaceful demonstrators, further escalating tensions.

For meaningful progress, the government must listen to the voices from the streets. Open, transparent, and inclusive dialogue with stakeholders, including civil society, business leaders, and protesting citizens, is crucial. Addressing legitimate concerns about corruption and ensuring that any new tax revenues are used effectively for public benefit will be key to restoring trust.

The role of civil society

Civil society organisations have a vital role to play in this situation. By facilitating dialogue, advocating for transparency, and holding the government accountable, they can help bridge the gap between the state and its citizens. They must also ensure that the protests remain peaceful and that the voices of the marginalised are amplified.

In this climate of fear and repression, the Kenyan civil society must continue its fight for justice and accountability. The Finance Bill 2024, while significant, should not overshadow the fundamental rights and freedoms that are being trampled in its wake. It is a stark reminder that economic policies, no matter how crucial, should never come at the cost of human lives and dignity.

The current situation demands a multifaceted response: robust legal action against perpetrators, comprehensive reforms within the police force, and a renewed commitment to protecting human rights. Only through such measures can Kenya hope to restore faith in its institutions and ensure that the tragic events surrounding the Finance Bill 2024 do not become a permanent stain on its democratic fabric.

The protests against the Kenyan Finance Bill 2024 are a powerful reminder of the people's influence and the necessity for government accountability. As the nation stands at this critical juncture, the chosen path will significantly impact Kenya's socio-economic future. The government's ability to balance fiscal responsibility with social equity will test its leadership and commitment to the welfare of its citizens. Now, more than ever, it is crucial for the voices from the streets to be heard, respected, and acted upon.

COVER STORY

The hesitant sentry: Unpacking Justice Mugambi's injudicious judicial decision

By Joshua Malidzo

Introduction

On 27 June 2024, the Constitution of Kenya lost while the executive's word won courtesy of a hands-off approach to determining constitutional disputes adopted by Justice Mugambi. Although in the past, I have argued that a court of law can no longer afford to 'widdle its thumbs or wring its hand' and overlook threats or constitutional violations, Justice Mugambi just did that. Whereas in the field of constitutional horticulture, the High Court occupies a special place in Kenya's legal system, and its judges are expected to act as 'horticulturists who guide the work of gardeners in a national garden' as spelt out under Articles 23 and 165(3), Justice Mugambi dropped the guard.

Through an injudicious judicial decision, Justice Mugambi threw his hands in the air and granted the executive a blank cheque vide a vaguely crafted order. Simply, the ruling smacks of judicial surrender. This short piece briefly highlights my disappointments with the ruling. Although

Justice Lawrence Mugambi

our transformative Constitution demands the presence of vigilant judges or those referred to as *bold spirits*, the ruling reminds us that the Kenyan Judiciary is still occupied by *timorous souls* who can abdicate their solemn responsibility of being guardians of the Constitution when the seat is too hot.

Setting the scene: How did Kenyans find themselves in Justice Mugambi's court?

The Government of Kenya has been enacting annual Finance Acts. These Acts aim to amend previous tax legislation to raise more taxes. In 2023, the Ruto-led regime, playing

to the IMF tunes, introduced a Finance Bill which imposed heinous taxes on Kenyans. Kenyans led by the opposition went to the streets to oppose the bill. Despite the disapproval by Kenyans, the executive-controlled National Assembly passed the bill. Fortunately, the Act was temporarily stopped by Justice Thande and later partially quashed by Justice Majanja's led bench. In 2024, the Ruto-led regime remained defiant and introduced another terrible bill that proposed additional taxes, such as taxes on bread, motor vehicles and sanitary pads. Kenyans opposed this bill in its entirety during the public participation sessions. Despite this disapproval, the executive choir masters in the national assembly vowed to pass the bill, and indeed, passed it.

However, young Kenyans, especially the Gen Zs, started an online campaign calling for the rejection of the bill in its entirety. When the National Assembly was not listening, this leaderless and tribeless movement went to the streets. On 25 June 2024, Kenyans managed to get into parliament, but the members of parliament had to be evacuated. While reacting to this change of events, the President termed the occupation of parliament as treasonous and the protestors as criminals. The President promised to deal with the protestors firmly. Shortly after the speech, the cabinet secretary for defence issued gazette notice deploying the army to the streets to secure peace.

Aggrieved by this deployment, on 26 June 2024, the Law Society rushed to court with an application for interim conservatory orders and a petition. This petition landed in Justice Mugambi's Court. Although the LSK sought interim orders before the hearing of the application, Justice Mugambi declined to issue this order and fixed the matter for hearing the next day.

By this simple action, Justice Mugambi allowed the army to roam through the streets of Kenya on 27 June 2024 when Kenyans were still demonstrating. By this simple action, Justice Mugambi allowed the executive to threaten protestors and ensure that the protestors did not come to the streets. Justice Mugambi allowed the executive to win a small amount through this simple action. Previously, based on the urgency of a matter, judges have issued interim reliefs before a hearing of the application. Even on 26 June 2024, Justice Mwamuye and Chacha Mwita issued interim conservatory orders prohibiting and stopping the excesses of the government in dealing with the protestors. Therefore, nothing stopped Justice Mugambi from issuing the interim reliefs, which would have prevented the army from going to the streets before hearing the application.

On 27 June 2024, after hearing the parties, Justice Mugambi issued one of the most retrogressive rulings in Kenya since 2010. The ruling undermines the principle of supreme constitutionalism and the role of judges in safeguarding the Constitution. At the interim stage, Justice Mugambi allowed the executive to continue its unconstitutional mess and proceed with the army deployment. In essence, Justice Mugambi has already determined the main petition that is pending before him.

Judicial acrobatics and conservatory orders

A. Nature and purpose of conservatory orders

Under the principle of supreme constitutionalism, endorsed by Articles 10, 21(a), 22, 23 and 258 of the Constitution, the judiciary has been granted 'police powers', capable of arresting actual constitutional violations and threats of constitutional violations through interim orders. The courts are called upon to forestall the continued or threatened violation of the Constitution and the Bill of Rights. Interim orders such as conservatory orders empower a judge to protect the Constitution by not waiting until the 90th

minute of the football match but blowing the whistle even at the 10th minute. By doing so, courts can nip an alleged constitutional violation early even when the same is yet to materialise. Put differently, Kenyans and the Constitution should not be exposed to preventable risks when a court of law exists. Justice Mugambi's ruling, however, betrays this simple constitutional truth.

B. The case before Justice Mugambi

LSK's argument was simple. Whereas the KDF can be deployed internally, there are constitutional standards to be met under Article 241. Article 241 provides for two methods. First, where there is an emergency or disaster, the executive is allowed to deploy the KDF and then provide a report to parliament later on (Article 241 (3)(b). Second, KDF may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly (241 (3)(c). LSK argued correctly that although the government in the gazette notice deployed the KDF under 241(3)(b) and claimed it was under a security emergency, the correct route was article 241(2)(c) because there was no emergency. There was unrest or instability, and they should have sought parliamentary approval. The government, through its lawyers, insisted that there was an emergency and did not need to seek parliamentary approval. Justice Mugambi, however, missed an opportunity to ask the government lawyers why they sought parliamentary approval under 241(3)(c) after they had issued the earlier gazette notice.

C. Justice Mugambi's Judicial acrobatics and misses

That was not the only miss, however. Justice Mugambi's ruling contains several other misses. The Supreme Court has described the conservatory orders as simple preservation tools and bear a ***'more decided public-law connotation'***. This means that conservatory orders are issued when there is a threat to the Constitution, bill of rights and constitutional values. Because they are meant to nip an alleged violation, the test for the grant is relatively low. Under the Supreme Court's Munya, an applicant should demonstrate a *prima facie* case unless the conservatory order is granted, the petition would be rendered nugatory, and it is in the public interest that the order be granted. On the last aspect, the Court is supposed to consider the Bill of Rights, constitutional values and the public spiritedness that runs through the Constitution. Other courts have said that a court of law should opt for the **lower risk of injustice. (See Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others[2015] eKLR).** Justice Mugambi, however, misses these clear guidelines.

i. Failure to consider the three-tier test

First, my reading of the ruling does not show if the Judge considered these tests. Courts analyse one test to another in a typical ruling for conservatory orders. They first answer the question of whether there is a prima facie case. If yes, will the petitioners suffer irreparable damage/ petition rendered nugatory if the army is deployed to the streets? If it is positive, where does the public interest lie? Justice Mugambi does not do this. Of the 17 pages of the ruling, eight summarise the case, and on page 9, Justice Mugambi starts his analysis. In the analysis, Justice Mugambi avoids this test set out in precedents.

ii. Framing the wrong issue for determination

The second miss is that Justice Mugambi frames the wrong issues for determination. The first issue for determination was whether, prima facie, the gazette notice was issued in compliance with the Constitution and legislation. This cannot be an issue in an interim application (I return this issue

below). The second issue, whether the court should issue or grant orders sought in the application, was the only proper issue for determination. However, my reading of the ruling does not show when this issue was considered. The Judge frames this issue for determination and does not proceed to consider it. Is it that the issue was never considered, or in the judge's view, it was considered when the court refused to grant the prayers sought? In an ordinary judicial decision for conservatory orders, the judges frame this issue for determination and then proceed to consider the three-tier test set out by the Supreme Court.

iii. Eating a forbidden fruit

The third miss is that Justice Mugambi eats a forbidden fruit. Although forbidden from engaging in a full-blown analysis of the case while considering an application for conservatory orders, the learned Judge appears to have done that. For instance, Justice Limo observed that:

> *At an interim stage, a Court must navigate a thin line by avoiding delving into the merits of the suit/petition prematurely before hearing the parties but at the same time having an overview of the substance of the suit/petition itself and whether a case is made on a prima facie basis to warrant conservatory orders.*

Justice Mugambi goes against the caution in at least two ways. First, the first issue was framed as to whether, *prima facie*, the gazette notice was issued in compliance with the Constitution and legislation. The word prima facie does not save the situation. Considering this issue in the way the judge did, the main petition was determined. The proper question was whether petitioners had demonstrated a prima facie case to warrant the issuance of the orders sought. When framed as such, the Court should only have determined whether 'unless the court grants the conservatory order there is a real danger that he will suffer prejudice due to the violation of threatened violation of the Constitution'. (See **Centre for Human Rights Education and Awareness (CREAW) & 7 others v Attorney-General (2011) eKLR)**. An Applicant dislodges this hurdle if they highlight either a violation or a threat to a right, arguable Constitutional issues, to warrant a response from the respondents (see **Constitutional Petition 377 of 2015 Kevin K Mwiti & others v Kenya School of Law & others [2015] eKLR)**.

The question to be determined was whether the applicants had demonstrated an arguable case. Was it arguable that the gazette notice was unconstitutional? Was it arguable that the deployment of the KDF threatened rights and the Constitution? This is the only proper question at an interim stage.

Second and more clearly, the Judge's findings in the ruling seem to have compromised the pending petition. Take, for example, the Judge's determination of whether there was an emergency. The judge poses the question in paragraph 40 as follows: 'What then is the meaning of 'emergency or disaster' which is referred to in Article 241 (1)(b)?'. The Judge proceeds to make a finding in paragraph 42 as to what emergency means and, in paragraph 43, determines that the actions of the protestors amount to an emergency as under Article 241(1)(b) and, therefore, the state was justified to deploy the army without parliamentary approval. This finding cannot be made at the interim stage and for obvious reasons. The LSK petition pending before the judge is, for all purposes, dead. Justice Mugambi killed it at the interim stage. If the judge is already convinced of an emergency, what will the judge determine after hearing the parties?

Also, the judge makes the statement in para 52 that ' Consequently, even though the intervention is justified, given the situation that necessitated the immediate deployment

of the military....' and in para 53 that.

> **53. I make the following conclusions: i) Given the eruption and loss of control of the situation by the National Police that followed the public demonstration on 25 June 2024, thus necessitating emergency deployment of the military to assist in arresting the deteriorating situation which endangered life, property and critical government infrastructure, the application of Article 241(1)(b) was properly invoked in the circumstances.**

Justice Mugambi, therefore, lays the petition to rest at the interim stage. He framed the wrong question for the interim stage and gave conclusions that should have waited for the hearing of the petition. For this reason, I consider the judge's actions to amount to judicial acrobatics. Although not required to consider some questions, the judge proceeds. Although a party has a right to a fair hearing, the judge violates it by denying LSK the right to be heard on their merits without any care. Although called upon to exercise restraint and caution, to walk along thin lines, the judge throws all the caution into the wind and determines a constitutional petition at the interim stage. Why was there a hurry to make such a conclusive determination?

Justice Mugambi's interpretation errors

The misses alone are not enough to put the matter to rest. There are other obvious interpretation errors that the judge falls into. There are at least three errors that should have been avoided:

i. Interpreting the Constitution of Kenya

Interpreting a transformative Constitution requires judicial creativity rather than restraint. It calls for a more than ordinary vague and conservative approach to constitutional interpretation. For this reason, most transformative Constitutions have an inbuilt interpretation theory. Kenya's Constitution is no different. Articles 20(3) and 259 spell out how it should be interpreted.

Article 20(3) of the Constitution requires that when applying a provision of the Bill of Rights, a court shall **adopt an interpretation favouring the enforcement of a right or fundamental freedom.** Further, Article 259 (1) requires that the Constitution be interpreted to promote its purposes, values and principles and advance the rule of law, human rights, and fundamental freedoms in the Bill of Rights. The Constitution forbids an interpretation of the Constitution that is narrow, artificial, rigid and pedantic.

The Supreme Court interpreting Article 259(1) has provided leadership on the correct interpretation method of the Constitution. In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, the Court rendered itself thus (in ***paragraph 26***): *But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is a contextual analysis of a constitutional provision, reading it alongside and against other provisions to maintain a rational explication of what the Constitution must mean in light of its history, the issues in dispute, and the prevailing circumstances.*

Further, since ours is a thick Constitution, it requires an interpretation that is known as a purposive interpretation that promotes the Constitution's purposes, values, and aspirations. An interpretation that considers the context of a constitutional provision and reflects the historical, economic, social, cultural and political realities. This interpretation does not *favour formalistic or positivistic approaches* ***(Re Interim Independent Election Commission [2011] eKLR, para [86]).***

Did Justice Mugambi adhere to this well-trodden path? Unfortunately, no. The learned judges appear constrained by the legal culture that dominated pre-2010 Kenyan jurisprudence. Justice Mugambi adopts a reason that can only be described as 'word worship' and 'verbal mania'. Justice Mugambi does not even attempt to discover a more profound constitutional logic but adopts a photographic view of the judicial function. To him, maybe the Constitution is a mere skeleton without a soul or spirit.

According to the Judge, the issue before him was whether there was an emergency. To define what constitutes an emergency, he holds:

> *42. It is my considered view that the word as used in Article 241 (1) (b) is not a 'technical' terminology and is used in the ordinary sense of that word if it was meant to be a technical or special word, then the use conjunctive 'or' after the word 'emergency' which relates it to disaster would not have been inserted there. The fact that the framers of the Constitution used a different word alongside the word emergency to describe the situation that may call for military deployment shows that they did not intend to give that word any special meaning such as is used elsewhere in the Constitution where certain specific procedures are associated with it. It certainly does not refer to a state of emergency. I find that the word as used should take the ordinary English meaning which under Oxford English Dictionary, 11th Edition, means: - "serious, unexpected and potentially and dangerous situation requiring immediate action".*

The concept that a word used should take the ordinary English meaning is a language common in statutory interpretation. However, the new interpretation is a constitutional-conform approach to doing things in the new world. This means that every interpretation must give effect to the Constitution and its values. Resorting to English dictionaries without anything else is sinning against the Constitution. It is for this reason that the Former Chief Justice Mutunga stated that:

> **Our Constitution cannot be interpreted as a legal-centric letter and text. It is a document whose text and spirit have various elements built within its content, as amplified by the Supreme Court Act that is not solely reflective of legal phenomena.** This content reflects the historical, economic, social, cultural, and political setting of the country and also its traditions. **References to *Black's Law Dictionary* will not, therefore, always be enough.**

Any interpretation would require the consideration of Article 241 together with any other provision in the Constitution containing a similar word, such as Article 58, and then considering these provisions in content and along the historical analysis. For instance, why did Kenyans ensure that the army would be deployed without the approval of the parliament in one instance and with the approval of the parliament in another? The answer is simple: Kenyans wanted to keep the military in the barracks and enjoy their democratic space. Kenyans believed that if the military came to their streets, they had to be authorised by their representatives. Kenyans also left a window for the military to be deployed in an emergency or disaster.

Although the Constitution is silent about what amounts to an emergency under Article 241, constitutional silences must be interpreted in a manner that gives effect to constitutional values and principles. Under Article 58, Kenyans define a state emergency and set out limited legroom for the state so that the state cannot abuse the term emergency.

For Justice Mugambi to rely on a dictionary definition alone without more to give the state excessive legroom is a betrayal of the Constitution. Justice Mugambi's

ignoring constitutional values, context, history, and the committed dream to move from a militarised state to a democratic state in favour of a dictionary definition is an unforgivable constitutional sin. For Justice Mugambi to ignore and close his eyes to the fact that the State was playing a *constitutional hardball* violates the judge's oath to defend and safeguard the Constitution. This is because courts are called upon to prevent the twisting of the Constitution to suit temporary convenience, as one judge held:

> *28)........This Court is aware of attempts to twist the provisions of the Constitution to suit temporary convenience. That however will not do. Express provisions of the Constitution, the Supreme law of the land, should not be sacrificed at the altar of expediency. Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud.*

Unfortunately, by overlooking the constitutional hardball, Justice Mugambi has nurtured a tumour of impunity to reign supreme. Today and going forward, an emergency acquires the lowly set test of a dictionary. This means that the conversion of Kenya from a democratic state to a militarised state is guided by the dictionary meaning and that alone.

ii. Necessity and public interest

Justice Mugambi seems to have allowed military deployment based on necessity and public interest. He states in para 44, 'This court is today faced with two competing constitutional values: the need to protect life and property, preserve peace, order, and public safety, and the need to uphold and protect open public expression by citizenry in a democratic state.'

However, it is not clear which life the Judge was protecting. It is in the public gallery that the police have been killing protestors, and up to date, no police officer has been killed by the demonstrators. It is my considered view that the inclusion of life in the competing constitutional values was inappropriate unless the deployment of the army was to protect the protestors from the police.

On the other hand, the Judge expressed himself thus:

> *49. This court, shares the same view that the Petitioner's fear is not an idle contention. It is common knowledge that the military by the nature of training may be ill-equipped to deal with civilian population as their focus is armed combat where the military principle is generally suppression through the use of military force to resolve crisis.*
>
> *50. I would therefore agree with the petitioner that deploying the military in a blanket manner without defining the scope or nature of their operation or the duration of intervention is a dangerous trend that can bring about the militarisation of the country which is antithetical to the enjoyment of rights and freedoms.*
>
> *51. This can potentially muzzle the civilian population from protesting what it believes are unfair taxation policies imposed by the government and also drive a wedge between the military and civilian population that the military is meant to protect. Consequently, a clear balance must be struck and in the spirit of transparency and accountability clear terms of reference must be published for the public to know, interrogate and appreciate.*

The recognition by the Judge of the potential threats of having the military in the streets in such a blanker manner was necessary to send them to the barracks. The High Court has granted conservatory on the single aspect that Public interest demands that the Constitution and the law be respected and upheld **(Justice Mrima in Katiba Institute vs JSC (E128 OF 2022).** In **Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR**, the court held that **"there can never be public interest in breach of the law … because public interest must accord to the Constitution and the law as the rule of law is one of the national values under Article 10 of the Constitution."** And as the Court of Appeal added in **Capital Markets Authority v Jeremiah Kiereini & Another [2014] eKLR, individual rights "are so fundamental that they cannot be limited even by public interest'.**

Protecting property and preserving order and security can only be pursued in strict compliance with the Constitution. They cannot be allowed to be pursued outside the Constitution. Allowing such a move would render the Constitution useless. The **lower risk of injustice test** set out in **Mwangi Wa Iria (above)** would favour the allowing of the conservatory orders sought.

iii. Failure to preserve the Constitution and the Bill of Rights

One thing is clear: Justice Mugambi failed to preserve the Constitution and the Bill of Rights. In the blink of an eye, Justice Mugambi granted the state a blank cheque. In a complete dereliction of duty, Justice Mugambi allowed the Executive to deploy the KDF on their terms. Without a sufficient gazette notice, the test for a conservatory had been met. Allowing the executive to go and clean their mess without requiring them to provide a gazette notice for the court to satisfy itself if it is compliant is playing into the hands of the executive.

Article 23 confers a constitutional jurisdiction on a court determining a constitutional claim to fashion any appropriate reliefs to safeguard the Bill of Rights and the Constitution. The court should offer a remedy to ensure that the petitioners and the general public on whose behalf the petitions are filed are not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon them. This is meant to give interim protection and not expose others to preventable perils or risks by inaction or omission.

Constitution

By sinning against the aura of the Constitution, Justice Mugambi abdicated his role as a watchful guardian of the Constitution and became a hesitant sentry. This risks transforming the judiciary from being the last hope of the ordinary person to the lost hope of the common of the ordinary person. The judiciary is constitutionally mandated to safeguard the Constitution and stop further violations by formulating effective remedies. Treating the government with kids' gloves demonstrates a sweetheart relationship between the judiciary and the executive. To kowtow to the executive and act as a poodle of the executive by accepting the executive's language of public order and safety while ignoring Wanjiku's pleas of apparent threats to the Constitution and the Bill of Rights risks undermining the public confidence in the judiciary.

Joshua Malidzo Nyawa is an Advocate of the High Court of Kenya. He holds a postgraduate diploma from Kenya School of Law and a Bachelor of Laws from Moi University School of Law, Kenya. He has a keen interest in Constitutional Law, Comparative Constitutional Law, human rights and Administrative Law.

Statement on allegations of abductions of protesters

By Hon. Martha Koome

1. I have noted with deep concern the numerous allegations regarding the abductions of protesters amid the ongoing mass protests in our country. Such actions, executed by persons not identifying themselves and without presenting the abducted individuals before a court of law, amount to a direct assault on the rule of law, human rights, and constitutionalism, which are our guiding national values and principles of governance as enshrined in Article 10 of the Constitution.

2. Our transformative Constitution mandates that law enforcement operates strictly within the confines of the Bill of Rights and the law. Article 49 specifies the rights of arrested persons, including the right to be informed of the reason for the arrest, to communicate with an advocate and others whose assistance is necessary, and to be presented before a court as soon as reasonably possible—but no later than twenty-four hours after the arrest. Furthermore, Article 51 addresses the rights of persons detained or held in custody, including their entitlement to petition for an order of habeas corpus.

3. Given these constitutional guarantees, I call upon all state agencies within the justice sector to uphold their constitutional duties and ensure that their actions are compliant with both the Constitution and the law. Any deviation from the stipulations of the Bill of Rights and the law not only invites anarchy and lawlessness in our country but also constitutes a severe assault on the value-order of governance stipulated in Article 10 of the Constitution.

4. Agencies within the justice sector, working under the auspices of the National Council on the Administration of Justice (NCAJ), have in the past committed to working towards ensuring that ours becomes a human rights-based criminal justice system that adheres to the Constitution, particularly the Bill of Rights, and the law. I therefore urge all agencies in the justice sector to process any criminal actions lawfully and to investigate and address the allegations regarding abductions related to the ongoing protests.

5. I take this opportunity to assure the nation that the courts are prepared to operate beyond standard working hours if the abducted persons are presented before the court and also to consider any petitions for habeas corpus. This commitment is to ensure that our nation continues on the path of the rule of law and constitutionalism and to guarantee that all state and non-state actors operate within the strict boundaries erected by our Bill of Rights.

Hon. Martha Koome, FCIArb., EGH is the Chief Justice and Chairperson of the National Council on the Administration of Justice (NCAJ).

In memory of

Hon. Monica Njoki Kivuti
(P.105/7194/08)

A Celebration of Life

It is with a great sense of loss and heartfelt grief that we are gathered here in memory of the **Late Hon. Monica Njoki Kivuti.**

The **Late Hon. Monica Njoki Kivuti** was a member of the Law Society of Kenya, having been admitted to the Bar on 7th November, 2008. She attended as a pupil and received instructions in the proper business, practice, and employment of an Advocate from Lilian Wakiiya Mwaura, Advocate. This was preceded by her graduation from Moi University on 15th December, 2006 with a Bachelor of Laws Degree.

After her admission, she joined Directline Assurance Company Limited where she worked until she joined the Judiciary on 17th July, 2013.

For over a decade, Monica diligently served Kenyan courts as a magistrate. Throughout her legal career spanning 13 years, Hon. Kivuti was committed to the rule of law. She believed in its fair and temperate application to ensure equal justice for the meek as well as the mighty. She was a devoted public servant, exemplifying integrity, compassion, and unwavering dedication to the administration of justice.

In memory of

Hon. Monica Njoki Kivuti
(P.105/7194/08)

A Celebration of Life

Her career spanned more than a decade, marked by a deep commitment to upholding the rule of law and ensuring fair judicial proceedings. She was a meticulous professional, thorough, and impartial in adjudicating cases. She endeavored to do justice, striving not only to help those less fortunate than herself but also to train those who sought to follow in her footsteps. She set a remarkable example in the way she conducted herself – always humble, decent, and caring.

Hon. Kivuti also led a varied and rich life apart from the Bar. She was actively involved in community service initiatives, including setting up a center for survivors of gender-based violence at Jamhuri Police Station and spearheading outreach programs for underprivileged children at Nairobi Chapel. Her compassion and commitment to social justice extended beyond the legal realm, leaving a lasting impact on those she served. This gentle, remarkable, and unique woman kept faith in the dream to which she was entrusted, and we would do well to pursue her example.

Friends and family members affectionately talked about a passionate mum, sister, daughter, and magistrate. Those of us who had the fortune of knowing **Hon. Kivuti** closely greatly valued her wisdom and sagacity.

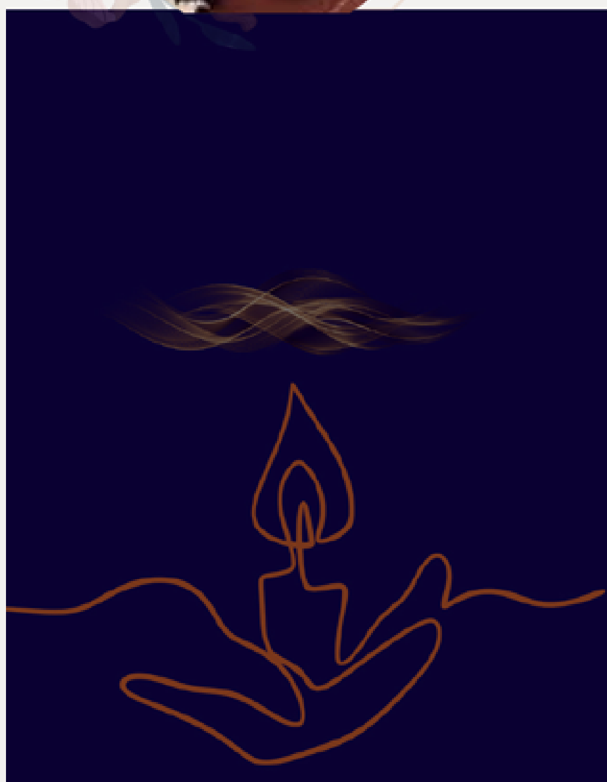
In memory of

Hon. Monica Njoki Kivuti
(P.105/7194/08)

A Celebration of Life

Being in her company and sharing conversations with her was always a delightful experience. She loved her country; she loved the Lord; she loved the law, and she was faithful to all. She was truly a credit to the legal profession and the country at large. Her passing is an irreparable loss to the entire legal fraternity.

The brutal killing of **Hon. Monica Njoki Kivuti,** a dedicated magistrate and esteemed member of the judiciary, is an appalling act of violence that has shaken the legal community and our nation to its core. Her untimely death, a stark reminder of the dangers faced by judicial officers in the line of duty, is an affront to justice and the rule of law.



The Law Society of Kenya condemns this heinous crime in the strongest terms possible. We demand swift and thorough investigation into this senseless act, ensuring that all those responsible are brought to justice swiftly and face the full force of the law. There can be no tolerance for such egregious attacks on judicial officers who serve our country with integrity and dedication.

In memory of

Hon. Monica Njoki Kivuti
(P.105/7194/08)

Hon. Kivuti's commitment to upholding the rule of law and ensuring fair judicial proceedings will forever be remembered. Her tragic loss underscores the urgent need to bolster security measures within our courts and protect those who administer justice.

In response to this tragedy, the Law Society of Kenya will take decisive action. We will collaborate closely with the judiciary and law enforcement agencies to implement comprehensive security reforms aimed at safeguarding the lives of judicial officers and legal practitioners. We will advocate tirelessly for enhanced protection measures, including stringent security protocols and the deployment of adequate personnel at all court premises nationwide.

Furthermore, we call upon the government and all relevant authorities to prioritize the safety of judicial officers and uphold their constitutional mandate without fear or favor. The legal fraternity stands united in mourning the loss of Hon. Monica Njoki Kivuti and in solidarity with her family, colleagues, and friends during this devastating time.

In memory of

Hon. Monica Njoki Kivuti
(P.105/7194/08)

A Celebration of Life

We extend our deepest condolences to her husband, Mr. Mutimu Kang'atta, Advocate, and her three children. May they find strength and solace in this difficult period. The only mistake this family made was to dedicate their lives, career, and time to the Kenyan Justice System. While Monica served the bench, Mr. Mutimu Kang'atta, Advocate, her beloved husband, belonged to the bar.

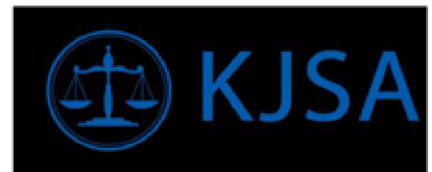
Monica, you no doubt lived your life like a candle in the wind. Go in peace. Your candle burned out long before, your legend ever will.

Let us honor her memory by ensuring that her tragic death serves as a catalyst for meaningful change.

The Law Society of Kenya remains steadfast in our commitment to justice, security, and the rule of law. Together, we will honor Hon. Kivuti's legacy by safeguarding the principles she held dear and by continuing to uphold the highest standards of legal integrity in our beloved nation.

Dated 18th June, 2024

FAITH ODHIAMBO
LSK PRESIDENT



16th June 2024.

Fellow Kenyans,

RE: **JOINT STATEMENT BY THE KENYA MAGISTRATES AND JUDGES ASSOCIATION AND THE KENYA JUDICIAL STAFF ASSOCIATION ON THE WANTON NEGLECT OF THE SECURITY, TRANSPORT AND WELFARE OF THE JUDICIAL OFFICERS AND THE NATURAL CONSEQUENCE OF THREAT TO JUSTICE**

On 13 June 2024, a most distressing and tragic event shook the judiciary and the public. A senior police office who command duties assaulted and attacked a judicial officer, Hon Monica Kivuti in the course of her work, at the workplace.

Hon. Kivuti was killed by a public officer who should have known better. The public officer must have been aware of the processes within the administration of justice sector.

Hon Kivuti was seated in her seat of justice hosted in a makeshift dilapidated tent that those responsible for giving her a decent, safe and deserving alter of justice, had availed her.

The late Hon. Kivuti had just delivered a ruling that caused the trigger-happy senior police officer to majestically and unfettered, walk towards her, draw a gun at her at close close of less than one metre, scold her for the ruling she had delivered, before pulling the trigger and aimed at her vitals. 4 bullets lodged in the body of Hon Kivuti. 36 hours later, the late Hon. Kivuti succumbed to the injuries sustained.

Fellow Kenyans,

I request that we observe a moment of silence in honour of our late sister Hon. Monicah Kivuti.

One of the primary roles of a government is to ensure the safety and security of all citizens.

An employer equally has a cardinal duty to provide a safe and secure work place environment. The duty has been recognised in the Occupational Safety and Health Act. The obligation includes employers in the public service.

The Judiciary as an employer must strive to ensure a safe and secure work space for all its employees, judges, magistrates, kadhis, adjudicators and staff.

In order to a provide safe and secure work space, the Judiciary must depend on resources provided by other organs of government. These resources include financial and human capital.

It needs no gainsaying that the organs of government which should be facilitating the judiciary to ensure a safe and secure work space have failed. But we cannot blame the other organs without introspecting on the steps we have taken as a judiciary within the meagre resources we have to secure our staff.

Attacks against judges and judicial officers have been witnessed in the past. Earlier this year at the Mombasa Law Courts, an accused person snatched a gun from a police officer and made an attempt to shoot a magistrate. The magistrate was saved when the firearm jammed.

In Nakuru Law Courts, a magistrate was attacked and severely stabbed by the use of a screwdriver by a litigant who had gotten an unfavorable judgment.

In Garissa, a Court user attacked a judge. The missile aimed at the judge missed narrowly.

These are just but a few of the many attacks that have happened in courtrooms. Judges, Magistrate, Kadhis and judicial staff have time without number been stalked, spied and accosted by suspicious persons, have had their children kidnapped, their kindred threatened, their homes broken into and other despicable heinous acts done to them just because of the work they do.

Some judicial officer faced with threats have opted to resign rather than pay with their dear lives.

The attacks on judges, magistrates, Kadhis and judicial staff is a sure threat to the rule of law and administration of justice.

Fellow Kenyans,

We are aware that the judiciary has previously established Taskforces to look into the safety, security and welfare of all staff of the judiciary and they have made recommendations.

It is unfortunate that the recommendations have not been fully followed through or implemented.

The Executive Council, National Council of the Kenya Magistrates and Judges Association, and the leadership of the Kenya Judges Welfare Association and Kenya Judiciary Staff Association met and made the following resolutions:

1. There shall be stoppage of all services offered by the members of the KMJA and KJSA; being the Judges, Magistrates, Kadhis, Registrars, Deputy Registrars, Judicial Staff from the 19th day of June 2024 to the 21st day of June 2024, both days inclusive.

   This is subject to review for extension if circumstances dictate by inaction.
2. **THAT** forthwith the members of the KMJA and the KJSA shall not conduct any Judicial Proceedings in the open air whether under a tent, container, any makeshift structure or otherwise.
3. **THAT** forthwith the members of the KMJA and the KJSA shall only conduct Judicial Proceedings from professionally approved buildings.
4. **THAT** forthwith, in any case, the Judges', Magistrates' and Kadhis' designated private chambers, shall not be used for conducting the would be open court Judicial Proceedings.
5. **THAT** forthwith, there be strict adherence to security check protocols and no object unrelated to the business of the court, or firearm other than that held by a designated officer of the court as shall be authorized by the officer in-charge of security of the Court, shall be allowed into the court or Court station by any Court User.
6. **THAT** members of KMJA and the KJSA shall only conduct their proceedings after ascertainment that there is provision of armed security in the courts.

7. **THAT** there is no Court User who shall be allowed in the Court premises while in any form of concealment of faces by whatever manner, unless on ascertainable medical or security grounds.

Fellow Kenyans,

Justice, strong and independent institutions are the cornerstones of our society. Threats to Justice may take many forms. Attacks on Judicial Officers, killing of Judicial Officers for doing that which is delegated to them by Kenyans to do and neglecting the welfare of the Judicial Officers by the State are just but the living forms of threats to Justice. Our actions are intended to accord the JSC, the SRC, Parliament, the Executive and the National Security Organs time to deliberate on these very basic requests by our members on the provision of security and transport to all the Judicial Officers and demonstrate positive and deliberate steps in fostering the independence of the Judiciary and we hereby candidly forewarn that any cosmetic kneejerk reactions are unwelcome.

We call upon our members to remain put and assure them that justice shall indeed remain our shield and defender.

Statement issued at Nairobi on this 16th day of June 2024

Signed For KMJA

Hon. Mr. Justice Stephen Radido
President, Kenya Magistrates and Judges Association
Signed For KMJA

Mr. Boru Wako

Law Society of Kenya

LAW SOCIETY OF KENYA

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PRESS STATEMENT

Our Ref: S/24

Your Ref: T.B.A

Date: 24th June, 2024

THE LAW SOCIETY OF KENYA STATEMENT ON THE ABDUCTION OF DR. AUSTIN OMONDI, DR. SALIM ISHMAEL AND MR. SHADRACK KIPRONO (SHAD KHALIF)

The Law Society of Kenya (LSK) is a professional statutory body established under the Law Society of Kenya Act, 2014 with membership of all Advocates in Kenya. The LSK is mandated to among other things, protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law, to uphold the Constitution of Kenya and advance the rule of law and the administration of justice.

Over the last 72 hours, Kenya has been drawn back to the dark era of a rogue, irrational police force operating through repressive, retrogressive, clandestine, illegal, extra-judicial tactics to forcefully quell public dissent against misgivings of government, lapses in governance and more specifically, the contentious Finance Bill 2024. The unity of purpose and common resolve of the young people of Kenya has seen professionals, students, digital content creators and youth from all walks of life put together their diverse skills, competencies and capabilities towards promoting their cause. The unprecedented unity and ingenuity that has become characteristic of the current wave of protests has caused disquiet within government and the regrettable reaction has been deployment of brutal, disproportionately retaliatory police force.

After failing to impose criminal charges against innocent protestors who were subjected to arbitrary arrests and despite lacking justification to qualify any degree of force against the largely peaceful protestors, the police have turned to intimidation of perceived leaders, mobilizers and facilitators of the protests. Several vocal personalities and social influencers have reported that they have been threatened, physically trailed, had their communications arbitrarily monitored and privacy unlawfully infringed. The disconcerting complaints culminated in the abduction of some of the personalities that have been strongly expressive in affirming the general public discontentment with the Finance Bill 2024.

On Saturday 22nd June 2024, **Billy Simani**, alias **Crazy Nairobian**, was taken into police custody and held incommunicado. Throughout the day, there was widespread misinformation from personalities close to government on the whereabouts of Billy and the reason for his abduction veiled as an alleged arrest. Late into the night, after combined efforts

Faith Odhiambo (President), Mwaura Kabata (Vice-President)
Tom K'opere, Teresia Wavinya, Hosea Manwa, (General Membership Representatives)
Gloria Kimani, Irene Otto, Stephen Mbugua (Nairobi Representatives)
Vincent Githaiga, Lindah Kiome, Hezekiah Aseso, Zulfa Roble (Upcountry Representatives)
Elizabeth Wanjeri (Coast Representative)

with various stakeholders and several of our members, the Law Society of Kenya was able to secure the release of Billy. **Mr. George Dianno** was also abducted in Nakuru and released in Eldoret. The unfortunate events and the large outcry from members of the public through various social media platforms appear not to have been sufficient in derailing the unconstitutional conduct of the police. As things stand, the abductions of Billy Simani and George Dianno appear to have been the start of police reversion to unlawful, draconian tactics to limit the enjoyment of rights by the people of Kenya.

On Sunday 23rd June 2024, less than 12 hours after Billy was released, reports emerged of the abduction of **Dr. Austin Omondi**, a young Doctor who has taken the initiative to coordinate medics to provide first aid treatment to protestors who suffer the gruesome effects of police brutality, was abducted by unidentified persons reported to be police officers and is being held incommunicado. Similarly, we have received reports of the abduction of **Dr. Salim Ishmael** and that of **Mr. Shadrack Kiprono** alias **Shad Khalif** who were also abducted yesterday and their whereabouts are currently unknown. This perpetual contempt by the law enforcement agencies must come to an end. We have made rounds around various police stations to establish where Dr. Austin, Dr. Salim and Shad Khalif are being held, but no clear disclosure has been forthcoming. Accordingly, we consider Dr. Austin Omondi, Dr. Salim Ishamel and Said Khalif as kidnapped and consider their abductors as criminals.

We call on all members of the public to remain vigilant and provide any information or tip offs on the possible whereabouts of Dr. Austin, Dr. Salim and Shad Khalif or the identity of their abductors. We demand that the police and all investigative agencies treat this matter delicately and with expediency to unearth the truth on what happened to Dr. Austin, Dr. Salim and Shad Khalif, the identity of those holding them and where they are being held. It is inconceivable that law enforcement officers are the perpetrators of illegalities and we will unmask and take actions against these rogue criminal elements putting our police in ruin.

FAITH ODHIAMBO
PRESIDENT, LAW SOCIETY OF KENYA.

Faith Odhiambo (President), Mwaura Kabata (Vice-President)
Tom K'opere, Teresia Wavinya, Hosea Manwa, (General Membership Representatives)
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ORGANIZATION OF COMMONWEALTH CARIBBEAN BAR ASSOCIATIONS

President	Vice-Presidents	Secretary	Treasurer
Donovan C. Walker	*Sophia Chote, SC* *Lorraine Debra Glace*	*Shirlan Barnwell*	*Sherrie-Ann Bradshaw*

STATEMENT BY THE ORGANIZATION OF COMMONWEALTH CARIBBEAN BAR ASSOCIATIONS

Re:- The murder of The Hon Justice Monica Kivuti of the Judiciary of Kenya.

The Organization of Commonwealth Caribbean Bar Associations (OCCBA) and the sixteen Bar Associations that comprise OCCBA joins in solidarity with the Judiciary of Kenya and the Law Society of Kenya in our condemnation of the murder in open court of the Hon. Justice Monica Kivuti, Principal Magistrate of the Makadara Law Courts of Kenya.

Media reports are that on Thursday June 13th, 2024 Principal Magistrate Kivuti, while presiding over an active court session in Kenya, was shot by an assailant. Despite the efforts of medical teams, Principal Magistrate Kivuti succumbed to the gunshot wounds on Friday June 14th, 2024. As shocking, is that the now deceased assailant has been identified as a police officer in Kenya. This assassination of Principal Magistrate Kivuti has shocked the entire legal and judicial community of Kenya and also the judiciary and legal profession in the entire Commonwealth Caribbean.

OCCBA offers our sincere condolences to the family of Principal Magistrate Kivuti and to the Judiciary of Kenya led by Hon. Chief Justice Martha K. Koome and the Law Society of Kenya led by President Faith Odhiambo. We wish to assure them that OCCBA stands with them in solidarity and offers our support and hand of friendship during this time of sadness for the Judiciary and the Bar of Kenya.

We note the recent remarks of President Odhiambo, of the Law Society of Kenya, who states that in Kenya *"...some advocates in matters they are handling get death threats…The death of Principal Magistrate Kivuti must not be allowed to be just another statistic of the imminent risks of ignoring the credible danger faced by Judicial Officers and Advocates in their line of duty...".* OCCBA strongly condemns this malicious and brutal murder which must not be viewed only as a cowardly attack on Principal Magistrate Kivuti but as an attack on the Rule of Law in Kenya, indeed worldwide. We call for an immediate investigation and appropriate actions taken to safeguard the Judiciary of Kenya and the Rule of Law in that country.

Valuable lessons for the OCCBA region.

This unfortunate incident holds valuable lessons, not only for Kenya, but the Judiciary and the Bars in our region. This assassination reminds us of the continuing need to sensitize our society, at all levels (including the police), on our respective Constitutions and the rights, duties and obligations falling thereunder. Importantly, we are aware that many of our Judges in our region do not have the necessary security as they are not assigned police protection. Also, courtrooms need to be secured with adequate metal detectors. There needs to be improved screening of our police officers who also need to be continuously exposed, educated and sensitized on the laws impacting their professional duties and the rights of citizens.

OCCBA commends the timely and decisive statements of the Law Society of Kenya who rose to the occasion in support of the Judiciary of Kenya. OCCBA stands with our colleagues and friends in Kenya as we continue to be strong and jealously guard our respective Constitutions, safeguard the Rule of Law, and speak out on issues impacting human rights and the administration of justice. The legacy of the Hon. Justice Monica Kivuti deserves no less.

END – 17th June, 2024.

ORGANIZATION OF COMMONWEALTH CARIBBEAN BAR ASSOCIATIONS
DONOVAN C. WALKER – PRESIDENT. CONTACT:- dcwalker@hmf.com.jm.

Commonwealth
Lawyers Association

Condemning the arrest, abduction and killing of civilians protesting the Finance Bill in Kenya

The Commonwealth Lawyers' Association (CLA) has been monitoring the nationwide protests in Kenya following the tabling of the Finance Bill. Civilians, mostly youth, assembled en masse to demonstrate their displeasure at the Bill in largely peaceful processions. The CLA is alarmed at reports from several credible sources, including the Law Society of Kenya and Amnesty International, that some protesters have been arrested, abducted, and killed in exercising their constitutional right to freedom of expression and freedom of assembly under the Kenyan constitution. We are further alarmed at the deployment of the military to quell the protests with rounds of live ammunition being fired at the protesters. We have received further reports that there has been a partial internet shutdown in Kenya to stop the flow of information. We are equally dismayed by statements by President of the Republic of Kenya, His Excellency William Ruto, that the acts of the demonstrators will be treated as treasonous. We therefore urgently call upon the Kenyan government to:

1. Respect the right of Kenyan citizens to peacefully assemble and express themselves.
2. Ensure all communication lines, including the internet remain open for access to information, including through the media.
3. Desist from using live ammunition against the protestors
4. Release the protestors who were demonstrating peacefully
5. Search for and release those protestors who have been abducted
6. Engage the people of Kenya on their grievances around the proposed Finance Bill.
7. Recognise and respect the will of the Kenyan people.

This statement was first published by the Commonwealth Lawyers Association. The Commonwealth Lawyers Association is an international non-profit organisation which exists to promote and maintain the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.

Statement from the Commonwealth Secretary-General, the Rt Hon Patricia Scotland KC, about the protests in Kenya

The Commonwealth

The Commonwealth is deeply saddened by the recent developments in Kenya. A peaceful movement, aimed at sparking dialogue on the Finance Bill, escalated into shocking violence, destruction and tragic loss of life. Our thoughts are with all those affected.

The Commonwealth acknowledges the Kenyan government's efforts to address the fiscal deficit through the recent Finance Bill. We recognise the challenges Kenya and other member countries face in balancing public investment needs with fiscal consolidation pressures, given the current international financial landscape. We have consistently called for urgent reforms to these structures, and we do so again now. The Commonwealth will continue to support the development of more inclusive and equitable frameworks that benefit all member countries.

Meanwhile, we continue to closely monitor the situation and call for calm as we urge all leaders, citizens, and stakeholders in Kenya to exercise restraint and prioritise the well-being and safety of all individuals. It is imperative to respect the rule of law and uphold democratic principles, ensuring that any actions taken are proportionate within the framework of Kenya's constitution and legal framework.

We welcome the joint statement on the protests by Ambassadors and High Commissioners to Kenya, as well as the statements by the African Union Commission, and the UN Secretary-General. We add to their pleas, calling on all authorities to be faithful to the Constitution and to the rule of law. We hope for a swift return to peaceful discourse.

The Commonwealth stands ready to support Kenya in its pursuit of peace, stability, and development. We believe in the strength and resilience of the Kenyan people and their capacity to overcome challenges through constructive dialogue, as has been the case throughout the country's long history.

Congratulations!

We congratulate Nyaga Dominic, an Editor of this publication for over five years, on being called to the Bar. Dominic has also been admitted to Harvard Law School for a Master of Laws degree beginning this fall. We are proudly associated.

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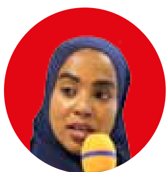
The parliament betrayal: When the ayes have it



By Munira Ali Omar

In the realm of democracy, the Parliament is seen as the cornerstone of representation entrusted with the solemn duty of safeguarding the interests and aspirations of the people. However, beneath the surface of legislative decorum lies a disturbing narrative—one of betrayal perpetrated by those elected to serve. The Parliament, once revered as a symbol of democracy has sadly become a hotbed for self-serving agendas as evidenced by the recent events that have exposed a systemic erosion of this fundamental principle with members of Parliament prioritising personal interests above the well-being of the people they are elected to represent.

Take a moment to ponder the glaring inequalities perpetuated by the recent laws enacted by the purported representatives of the people. Rather than acting as agents of equality, parliamentarians, in a spree are designing laws meant to serve as tools of oppression thus widening the gap between the haves and the have-nots.

While the privileged take advantage of favourable policies to amass wealth, the marginalised struggle against a heavy hand of the law that appears to burden them unfairly. Picture the single parent tirelessly juggling multiple jobs to put food on the table only to be confronted by the daunting reality of punitive policies that unfairly

burden them. Imagine a family torn apart by the burden of medical debt. Picture the heart-wrenching scenes of families facing evictions, torn from the very roofs over their heads due to skyrocketing rents or ruthless urban renewal and regeneration schemes. Imagine the anguish of children forced to leave behind the only homes they have ever known, their dreams and stability shattered by the callous whims of policymakers and private investors deepening the scars of inequality and injustice in our society. Picture the marginalised communities bearing the brunt of environmental degradation and industrial pollution while powerful corporations evade accountability. Picture a student shackled by an education system that prioritises profit over intellectual growth. Consider the hardworking individual stripped of their dignity and forced to endure punitive taxation that drains their earnings.

These narratives are not merely tales; they represent the very lifeblood of communities fighting to survive in a system that is rigged against them. The emotional toll of such injustices is immeasurable as dreams are crushed and futures snatched away by policies and laws that prioritise profit over people. Yet, perhaps the most heartbreaking aspect of this reality is the erosion of hope. When the very people who are elected to protect and uplift us betray our trust, it is easy to succumb to despair.

Silencing the people and marginalising public participation in the legislative process

Controversial laws like the Finance Act 2023, the Social Health Insurance Fund (SHIF) 2023 and the Affordable Housing Act 2023 among others served as a glaring example of democratic principles being undermined and public trust forsaken. For instance, despite resounding opposition by the public, the National Assembly bulldozed through the Affordable Housing Bill (as it then was) thus disregarding the voices of

National Assembly Finance Committee Chair Kuria Kimani addressing the media on Tuesday, June 18, 2024.

A OccupyParliament poster

those it purports to serve. In a troubling departure from principles of democracy and devolution, the Kenyan Senate also turned a deaf ear to the voices of the people, bowing to executive overreach and failing to safeguard the interests of the people or uphold the tenets of devolution.

Presently, vested interests have taken control of the legislative process with lawmakers often favouring partisan agendas over the common good. Corporate influences wield excessive control over legislative choices, manipulating lawmakers to advance their interests thus disregarding the broader public good. The result is a betrayal of the very essence of representative democracy, sidelining the voices of marginalized communities in favour of self-serving narratives. It is for this reason that the Kenyan youth decided to issue a strong call on social media using the hashtag ***#OccupyParliament*** to rally Kenyans to unite in urging members of parliament to reject the punitive Finance Bill 2024. Despite Gen Z leading demonstrations and passionately advocating for their voices to be heard, on 20th June 2024, once again, members of parliament demonstrated their resolve to ignore the concerns of their people. This betrayal of public trust is a damning indictment of our M.Ps' lack of commitment to protecting the interests of ordinary citizens. It sends a chilling message that the will of the people can be easily disregarded in favour of selfish motives and interests.

The power shift

The chants of "***Ruto must go"*** and "***RejectFinanceBill2024"*** reflect a deep disappointment, frustration and failure of our members of parliament to truly represent the people's voices, the Kenyan voices. This frustration has led to a movement towards self-representation, like the one we are witnessing right now: the plan to occupy Parliament. It signals that oppressed Kenyans are rising up and have started taking their rightful positions by rejecting deceit, conmanship and betrayal and this is just the beginning.

Tracy Chapman's timeless hit ***"Talkin' Bout a Revolution"*** whose message goes as follows is a timely reminder to our so-called leaders:

Protesters participate in a demonstration against Kenya's proposed finance bill 2024/2025 in Nairobi, Kenya

Don't you know, they're talkin about a revolution?
It sounds like a whisper, Poor people gonna rise up
And get their share
Poor people gonna rise up
And take what's theirs
Don't you know you better run, run, run...
Oh I said you better run, run, run...
Finally the tables are starting to turn
Talkin' bout a revolution

Reclaiming democracy and rising for justice

The struggle for justice and democracy does not end after the ballot box closes. It does not end with the passage of the punitive laws by corrupt and unprincipled leaders. Instead, it becomes a call for action igniting renewed vigilance in defense of the values that underpin our democracy. As we bear witness to this dark era of a government consumed by self-interest and exploitation, it falls upon every citizen to rise and demand accountability from our leaders challenging the culture of self-interest and impunity that has taken root within the Parliament. The recent realisation that there's no single saviour but us, the people, is a significant win. Only through this collective effort can we fulfil the true aspiration embodied in Abraham Lincoln's vision - ***A Government of the People, by the People and for the People.***

Munira Ali Omar is an Advocate of the High Court of Kenya, working with the Haki Yetu Organization as a Land Programs Officer.

The practicality of the right to recall legislators in Kenya

By Youngreen Peter Mudeyi

Abstract

In the High Court case of Katiba Institute & another v Attorney General & another, the right to recall elected officials under Article 104 of the Kenyan Constitution was scrutinised. The court, however, avoided a detailed analysis since no recall process had been initiated in Kenya. This case could have prompted change, but the avoidance principle prevailed. The Finance Bill 2024 has spurred public outcry, with Kenyans urging their MPs to oppose it. MPs' approval of the bill in its second reading has led to calls for recalling those who do not heed public opinion.
The article examines the practicality and effectiveness of the recall right for National and County Assembly members, noting significant obstacles in the Elections Act and County Government Act. These include the required percentage of elector signatures, the verification process, grounds for recall, and timing restrictions. The analysis also questions if non-voters in the original elections can initiate recalls and considers limits on the number of recall petitions and implications for disqualified candidates. It suggests re-evaluating the process and establishing a quasi-judicial body to handle recall petitions instead of the High Court; it provides a current procedure for recalling MPs while hoping for future amendments.

Kiambaa MP John Njuguna Wanjiku

Introduction

Contact your MP to voice your concerns, and if they do not respond, consider recalling them. MPs are elected to represent our views in parliament. However, Kiambaa MP John Njuguna Wanjiku claimed his duty is to support the President's agenda, not necessarily his constituents' wishes. This stance undermines the separation of powers doctrine, which is crucial for balanced governance. The controversial Finance Bill has sparked widespread opposition among Kenyans, raising doubts about whether MPs will reflect their constituents' wishes or follow the executive's directive.

Montesquieu, a famous French Jurist, in enhancing the concept of the "separation

[1]AW Bradley & K Ewing (eds) Constitutional and administrate law (1994) (11ed) 56.

Democracy emphasizes equality, freedom, and the participation of citizens in decision-making processes. Key principles include majority rule with protection of minority rights, free and fair elections, the rule of law, and respect for human rights.

of powers" encompasses three core ideas:[1] first, the distinct separation of personnel among the branches of government, such that individuals should not serve in more than one branch simultaneously. Second, each governmental branch should operate independently without undue influence or control from the others, ensuring, for instance, that the judiciary remains free from executive interference. Third, the functions of each branch should be clearly demarcated, preventing any one branch from assuming the roles of another. Kiambaa MP John Njuguna Wanjiku's actions blur the separation of powers, and if he fails to represent his constituents, he should step down or be held accountable by voters. This is what can be termed as true democracy and the Constitution of Kenya provides that Kenyans can do this through a recall process.[2]

What then is democracy? Democracy is one of the basic hallmarks of the Constitution of Kenya.[3] The people may exercise their sovereign power either directly or through their democratically elected representatives.[4] Kenyans delegated their sovereign power to the parliament and the legislative assemblies in the county governments which are required to perform their functions in accordance with the Constitution.[5] Sovereignty of the people comprises three elements; the power to constitute a frame of government, the power to choose those to run the government and the powers involved in governing.[6] Kenyans have exercised this sovereignty and they should be able to hold accountable any leader that betrays their sovereign power. One of the ways in which Kenyans exercise their sovereign power is by recalling non-performing members of parliament. In *Njoya*

[2]Article 104, Constitution of Kenya, 2010.
[3]Article 4(2) of the Constitution of Kenya 2010.
[4]Article 1(2) of the Constitution of Kenya 2010.
[5]Article 1(3) of the Constitution of Kenya 2010.
[6]BO Nwabueze *Presidentialism in Commonwealth Africa* (1974) 292.

Justice Aaron Ringera

& 6 others v Attorney General and 3 others (Njoya case),[7] the High Court found that sovereign power is an inherent entitlement that precedes the Constitution itself. James Madison in one of the Federalist papers once stated that;

> *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself".*[8]

I fully agree with Madison but add that the governed must also have the power to control the government since in reality, it is the governed who are the government. With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the republic is the sovereignty of its people.[9] Ringera J stated that a republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory and all government power and authority is exercised on behalf of the people.[10] The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/ or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution, and it cannot, therefore, be conferred or granted by the Constitution, and of course, it need not be.[11] For me, the best way for the people to exercise their sovereign power over the legislators is by providing checks and balances over them.

The right to recall is one of the ways in which Kenyans can exercise their constituent power over the legislators. In a democracy, if one can be elected then the electorate should have the power to de-elect incompetent and non-performing representatives.[12] A legislator is worth being considered non-performing when they decide to betray the representative desire and will of those they represent. In the first section, I look at the Finance Bill in passive so as to establish how it is contrary to the will of the sovereign before embarking on the recall process in Kenya. I then assess the grounds for recall in Kenya and finally offer recommendations on the steps that the country needs to adopt. In the next part of

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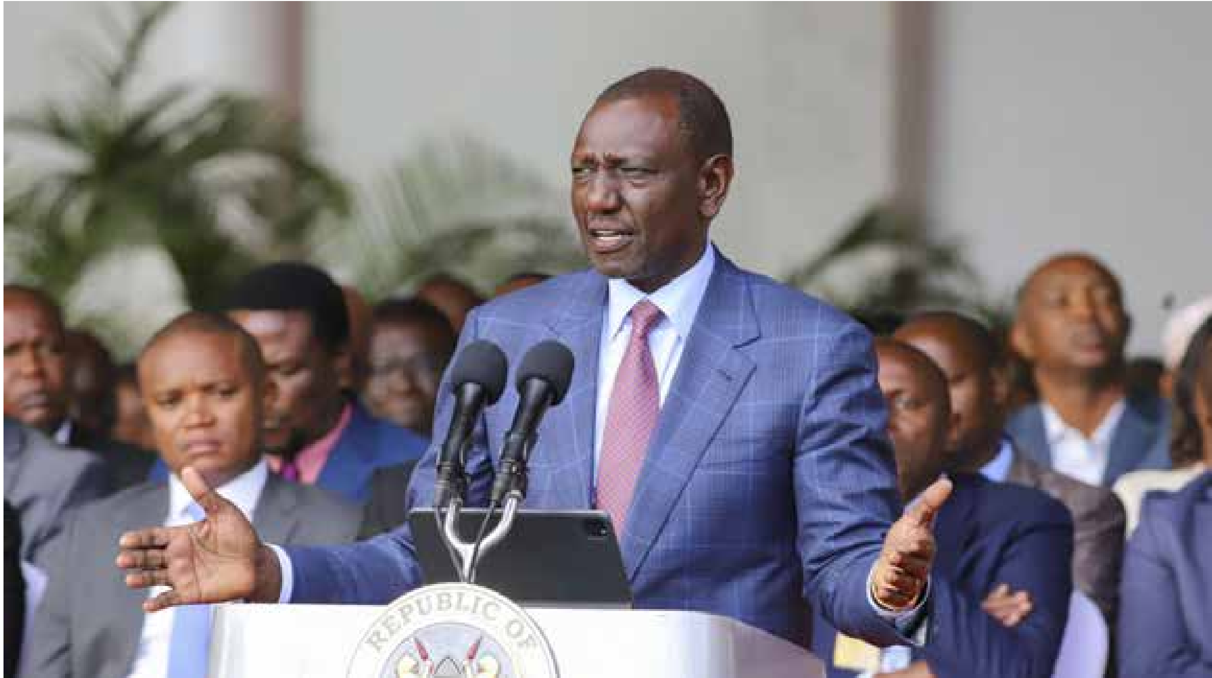
[7](2008) 2 KLR.
[8]Federalist paper no.51.
[9]Article 4(1) of the Constitution of Kenya 2010.
[10]Njoya & 6 others v Attorney General and 3 others, (2008) 2 KLR.
[11]Ibid.
[12]Bhanu, Vinod, Right to Recall Legislatures: The Chhattisgarh Experiment (October 4, 2008). Economic & Political Weekly, pp. 15-16, October 2008, Available at SSRN: https://ssrn.com/abstract=1855999.



President William Ruto addresses the media at State House where he announced the withdrawal of the Finance Bill 2024.

this paper, I slightly scrutinise the Finance Bill 2024 and how the Kenyan electorate, I included, are not for it before embarking on seeing how the exercise of the right to recall could save the situation.

The Finance Bill 2024, the source of all the problem

Kenyans were mockingly calling President William Ruto Zakayo- a Swahili word for a biblical figure Zacchaeus, who is portrayed as a greedy tax collector.[13] The President replied to the sentiments by stating that since he has already been called Zakayo, maybe Kenya will have a tax collectors' day. The statement might have sounded light and sarcastic, but the introduction of many new unsystematic taxes is greatly affecting the nation. Maybe what is remaining is having a definite tax collection day. Winston Churchill once said that for a nation to try to tax itself into prosperity is like a man standing in a bucket and trying to lift himself by the handle.

Taxation is generally targeted at meeting two major objectives.[14] First, it is meant to raise revenue sufficient to fund public expenditure without too much public sector borrowing. Second, it is used in revenue mobilisation with an aim of enhancing equity while at the same time minimising taxation disincentive effects.[15] The canons of

[13]Basillioh Rukanga, William Ruto: The 'tax collector' president sparking Kenyan anger, BBC News, Nairobi, 20th December 2023. Available at < https://www.bbc.com/news/world-africa-67694865> accessed on 3rd March 2024.
[14]Muraya Lucy Njoki (2013) Taxation and Revenue Stability in Kenya. (Online) Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/63071/Muraya_Taxation%20and%20revenue%20stability%20in%20Kenya.pdf?sequence=3 (Accessed on 2nd March 2024)
[15]Eliud Moyi & Erick Ronge (December 2006), Taxation and Tax Modernization in Kenya: A Diagnosis of Performance & option for further Reform. Available Online at https://www.africaportal.org/documents/12008/Tax-Revenue-Performance-in-Kenya1.pdf (Accessed on 2nd March 2024)

The tax landscape in Kenya undergoes periodic reforms and updates through Finance Acts, which are presented annually and outline changes to tax rates, exemptions, and administrative procedures.

a good tax system include simplicity, equity, neutrality and administrative efficiency.[16] The question is, will the bill be able to achieve the two objectives and does it bear the canons of a good tax system? I will only evaluate a few provisions of the Bill.

The Finance Bill 2024 introduces a broad array of changes impacting Kenya's tax landscape. Notably, VAT exemptions on banking services like credit advances, cheque handling, and foreign exchange transactions are being removed, potentially increasing costs for consumers. Pension deductions are set to rise from Kes 20,000 to Kes 30,000 monthly, aimed at bolstering retirement savings. Amendments align the Tax Procedures Act with general provisions, excluding weekends and public holidays from tax computation periods. Changes to the Data Protection Act exempt the Kenya Revenue Authority (KRA) from constraints on accessing personal data crucial for tax enforcement. This greatly goes against the canon of administrative efficiency as the privacy rights of citizens are outrightly infringed. Moreover, VAT exemptions on ordinary bread will cease, potentially affecting suppliers' ability to pass input costs to consumers. It is imperative to note that bread serves as one of the main meals of the lower class in society. Does this meet neutrality? Does it serve to fill the gap between the riches and the poorest or it serves to widen the gap?

The introduction of an Eco Levy will apply varying rates per unit on items like office machines, calculators, smartphones, and others. Section 30A of the Income Tax Act, providing Affordable Housing Relief, is slated for repeal. Advance Pricing Agreements under the Income Tax Act aim to provide certainty in transfer pricing matters, benefitting both taxpayers and KRA by reducing administrative costs.

[16]PLO Lumumba & Luis Francheshi, the Constitution of Kenya, 2010, an Introductory Commentary (Nairobi: Strathmore University Press, 2014) 567.

Motor Vehicle Tax will be set at 2.5% of vehicle value with specified floor and ceiling limits, accompanied by penalties for non-compliance. The Finance Bill proposes revised timelines for tax refunds and an increase in the Import Declaration Fee from 2.5% to 3% of customs value. Amendments to the Excise Duty Act include repealing Section 14, impacting offsetting of excise duty on imports and services. Additionally, changes to the Affordable Housing Act aim to ease restrictions on the sale of housing units. These changes signal a comprehensive shift in Kenya's tax policy, affecting a wide range of economic sectors and taxpayer obligations. These are the reasons why most Kenyans have come out to openly challenge the bill and tell their MPs not to accept it. It is disturbing that '*Wananchi*' are against this bill but the MPs are acting deaf. It is diabolical. We have allowed them to forget who they represent beyond their own interests. It is time to slap them on their face, waiting for the ballot will be a waste of time. The option that we have now is recall, but the question is, what is the practicality and possibility?

The recall process in Kenya

Article 104 of the Kenyan Constitution grants the right to recall. This right is like a seedling: it can thrive or wither depending on the legislators. Unfortunately, its potential rests with self-interested MPs.[17] The right to recall refers to the right of the electorate of a state to recall the elected representatives or to call for a fresh election before the completion of the full tenure of office of the representative.[18] It is at times referred to as the citizen-initiated elections.[19] The right to recall allows citizens to hold leaders accountable by deciding if underperforming or errant representatives

The recall process in Kenya provides a mechanism for accountability and enables constituents to remove elected officials who fail to uphold their responsibilities or engage in misconduct. It is designed to ensure elected representatives remain accountable to the electorate throughout their term in office.

[17]Nyawa Joshua Malidzo, The Right of Recall in Kenya is Moribund (December 2, 2015). Available at SSRN: https://ssrn.com/abstract=3081445 or http://dx.doi.org/10.2139/ssrn.3081445
[18]Shiva Karthik, the Question of Electoral Recall in India: Panacea or Pandora's Box? (May 15, 2018). Pragyaan Journal of Law, IMS Unison University, Volume 8 Issue 1, 2018, Available at SSRN: https://ssrn.com/abstract=3691445
[19]Ibid 11.

A recall petition can be initiated by registered voters within the constituency or ward represented by the elected official. The petitioners must present grounds for recall and collect signatures from a specified percentage of registered voters as required by law.

should remain in office, protecting public resources from being wasted on ineffective governance.[20] The Elections Act outlines the recall process for MPs, while the County Government Act details the procedure for recalling county assembly members in Kenya.

Recall of members of parliament

The Elections Act provides that the electorate in a constituency may recall their Member of Parliament (MP) on grounds including violation of Chapter Six of the Constitution, mismanagement of public resources, or conviction of an offence under the Elections Act.[21] A recall of a member of parliament can only be initiated based on a High Court judgment confirming the grounds for recall. It can start 24 months after the MP's election and no later than 12 months before the next general election. Only one recall attempt is allowed per MP during their term, and unsuccessful candidates from the last election cannot initiate the recall. A voter must file a petition with the Electoral Commission, including a High Court order, specifying recall grounds, listing at least 30% of registered voters, and paying a fee. The list must also include at least 15% of voters from more than half the wards. The petition and list must be submitted within 30 days and then verified by the Commission within 30 more days. If verified, the Commission issues a recall notice to the Speaker within 15 days. A recall vote is held by secret ballot, decided by a simple majority, and is valid only if

[20]Bhanu, Vinod, Right to Recall Legislatures: (n above).
[21]Election Act NO. 24 of 2011, section 45-47.

50% of registered voters participate. If the recall succeeds, a by-election is held, and the recalled MP can run again. Note that this process has been simplified after the *Katiba case* and this is the process that we as the sovereign in Kenya can follow as from August 2024 because that is when two years will have elapsed. The problem that we might face is that the Independent Electoral Boundaries Commission lacks a quorum. This then calls for a hastened process in the constitution of the IEBC to give the sovereign the ability to exercise their constitutional rights.

Recall of members of county assemblies

The recall process for county assembly members in Kenya follows a defined set of steps.[22] To initiate a recall of a county ward member, voters can cite reasons such as gross constitutional violations, incompetence, misconduct, or conviction of a serious offence. This process is allowed only between 24 months after the member's election and 12 months before the next general election to avoid arbitrary recalls. A voter from the ward must file a petition with the Independent Electoral and Boundaries Commission (IEBC), detailing the grounds for recall and listing at least 30% of registered voters from that ward. The petition, including voter details and a fee, must be submitted within thirty days. The IEBC then has thirty days to verify the list. If verified, the IEBC notifies the county assembly speaker within fifteen days. A recall election is then held, asking voters to decide by secret ballot. If the recall succeeds, a by-election is held, and the recalled member may run again. The Constitution and the two Acts of Parliament also make provisions on the grounds of recall which are addressed below.

Grounds for initiation of a recall process in Kenya and the possible solution

The recall provisions for Members of Parliament (MPs) in Kenya, as outlined in the Election Act, and those for Members of County Assembly (MCAs) share some commonalities but also exhibit notable distinctions, with the latter being more expansive in its grounds for recall.[23] For Members of Parliament, the grounds for recall, encompass three main areas. Firstly, an MP may be recalled if found, after due legal process, to have violated the provisions of Chapter Six of the Constitution.[24] This includes ethical and integrity standards, emphasising the importance of upholding constitutional principles. Secondly, recall is warranted if an MP is found, through due process, to have mismanaged public resources, highlighting accountability in resource utilisation. Thirdly, a Member of Parliament can face recall if convicted of an offence under the Election Act, reinforcing the legal consequences of criminal actions.

On the other hand, the recall provisions for Members of the County Assembly in Kenya, while sharing similarities, are more expansive. The grounds include gross violation of the Constitution or any other law, demonstrating a broader scope for accountability.[25] In addition, recall can be based on incompetence, addressing concerns about the capabilities and qualifications of MCAs. The provision for gross misconduct is another distinctive ground, allowing for recall in cases where ethical standards are breached. Furthermore, an MCA can be recalled if convicted of an offence punishable by imprisonment for at least six months, aligning with the gravity of the offence. This is more expansive and it equates the grounds for recall in the United

[22]County Government Act, section 27-29.
[23]Elections Act section 45(1 & 2) & County government Act section 27(1 & 2).
[24]Elections Act, section 45.
[25]County Government Act, section 27(2).

Kingdom. To incorporate provisions similar to the recall process in England, Kenya could enhance its recall framework by adding elements that address criminal convictions. In England, recall can be initiated if an MP is convicted of a criminal offence and receives a custodial sentence or if the House of Commons resolves for a recall petition.[26] Kenya may consider including a provision that allows recall in the event of a criminal conviction with a custodial sentence for MPs and MCAs alike. This would align with the importance of maintaining public trust and ethical conduct among elected representatives.

To also expand the grounds for recall, Members of Parliament should undergo scrutiny by an independent body, allowing constituents to initiate recalls based on performance data.[27] Kenya can also adopt clause 112 of the CKRC draft Constitution which provides elaborate grounds for recall including incapacity; physical or mental and if circumstances arise that would disqualify a person to be elected as such including misconduct likely to bring hatred, ridicule, contempt or disrepute to the office and persistent desertion of the electorate without reasonable cause. While the recall provisions for both Members of Parliament and Members of County Assembly in Kenya share common elements, the latter's grounds for recall are more comprehensive. To further strengthen the recall process, Kenya could draw inspiration from the English model and consider incorporating provisions related to criminal convictions for both MPs and MCAs. This would contribute to a more robust and accountable democratic system.

The need for a High Court order for recall of parliamentarians

The requirement for obtaining a High Court order before initiating the recall of a Member of Parliament (MP) in Kenya adds a layer of legal scrutiny to the process, aiming to ensure a fair and justifiable basis for such a significant action.[28] However, this provision raises concerns, primarily regarding the potential delays within the Kenyan judicial system and the limited time frame for recall. The provision in question mandates that a recall can only be initiated upon a judgment or finding by the High Court confirming the grounds for recall.[29] This underscores the significance of a legal determination before proceeding with the recall process. While the intention is to prevent arbitrary or politically motivated recalls, the practical implications of this requirement are noteworthy.

Kenya's judicial system has faced persistent challenges, including case backlog, insufficient resources, and delays in the adjudication of matters.[30] Delays in obtaining a High Court order can slow down the recall process, affecting its efficiency and responsiveness. Considering a quasi-judicial body could expedite judgments and help meet the prescribed recall timeframe more effectively. In addition, the prescribed time frame for initiating a recall presents a significant constraint. A recall must be initiated twenty-four months after the election of the MP and not later than twelve months immediately preceding the next general election.[31] The two-year time frame, while designed to

[26]Recall of MPs Act 2015, s.1.
[27]Bhanu, Vinod, Recall of Parliamentarians: A Prospective Accountability. Economic and Political Weekly, December 2008, Available at SSRN: https://ssrn.com/abstract=1082691
[28]Elections Act, section 45(3).
[29]Ibid, 62.
[30]Kemboi, Leo Kipkogei, The Case Backlog Problem in Kenya's Judiciary and the Solutions (April 20, 2021). Available at SSRN: https://ssrn.com/abstract=3841487 or http://dx.doi.org/10.2139/ssrn.3841487
[31]Elections Act, section 45(4).

balance the need for accountability and the stability of parliamentary representation, may be inadequate given the potential delays in obtaining a High Court order. The time frame of two years assumes a swift legal process, including the High Court's judgment. However, in reality, legal proceedings can extend beyond this period, especially when considering the complexities and workload of the judicial system.[32] As a result, the limited time frame may undermine the efficacy of the recall mechanism, as the process might conclude just before the next general election, making the recall exercise redundant. To address these concerns and enhance the effectiveness of the recall process, Kenya could consider reassessing the time frame for initiating recalls.

A more pragmatic approach might involve extending the time frame or introducing provisions that acknowledge and accommodate potential delays within the judicial system. This adjustment would align the recall process with the practical realities of legal proceedings and ensure that citizens have a meaningful opportunity to hold their representatives accountable within a reasonable timeframe. This can be solved by establishing a quasi-judicial body that will deal with recall petitions and making its ruling final and not subject to appeal.[33] The body should also be given a specified timeframe within which it should determine the matter and give a final judgment. Capacity to initiate recall is also a very important issue, who then has it?

Capacity to initiate a recall

The High Court addressed the prohibitions of individuals who were unsuccessful contestants in the previous election from either directly or indirectly instigating a recall.[34] However, a notable paradox arises on the issue of permitting a recalled member to participate in the subsequent by-election.[35] This apparent inconsistency prompts scrutiny, particularly in relation to the notions of discrimination and equitable treatment. The court also stated that according to Article 104, the Constitution confers the right to initiate a recall process to the electorate under Articles 97 and 98. Crucially, it does not specify a particular class or category within the electorate with the exclusive authority to undertake this action.[36]

The court declared the two sections unconstitutional by noting that;

> *"In this regard, the effect of sections 45 (6) of the Elections Act and section 27 (6) of the County Governments Act is to limit the rights of those who unsuccessfully contested an election from initiating a recall petition. As we have held, Article 104 of the Constitution does not provide for such limitation. In our view the distinction created by the legislature between the incumbent and the person who contested and lost an election is not founded on an intelligible differentia; and, that differentia has no rational relation to the object sought to be achieved by Article 104 of the Constitution."*[37]

This legal discussion highlights the tension between preventing the misuse of recall provisions and ensuring inclusivity and broad electoral participation. The debate aims to balance these principles,

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[32]Angelo B. Dube, Assessment Study on Delayed Justice Delivery, p 3, Final Report July 2010.
[33]Bhanu, Vinod, Recall of Parliamentarians: A Prospective Accountability. Economic and Political Weekly, December 2008, Available at SSRN: https://ssrn.com/abstract=1082691
[34]Elections Act, section 45(6).
[35]Elections Act, section 47(7) & County Government Act, section 27(7).
[36]Katiba Institute & another (n 34 above)para 81.
[37]Ibid, para 87.

maintaining the Constitution's integrity and the people's democratic rights. The High Court[38] also noted that the imposition of a requirement that the person initiating a recall must have been a registered voter in the election for which the recall is sought is null and void.[39] This stipulation unjustly restricted the rights of subsequently registered voters. The court challenged the rational basis for such a limitation on a fundamental political right, asserting that it conflicts with Article 24(1) of the Constitution.[40] Article 24(1) specifies that any limitation on a right or fundamental freedom in the Bill of Rights must be reasonable and justifiable in an open and democratic society. The court also emphasised the importance of the right to recall as a component of political rights outlined in Article 38 of the Constitution.[41] However, it underscored that this right, established under Article 104, is not an alternative but a complementary right exercised by voters after a general election, offering them a means to reassess the true nature and character of the initially chosen representative.[42] The court maintained that, like other constitutional rights, the right to recall must be treated equally, subject to legislative prescriptions that do not contravene the Constitution. The threshold for recall has also posed a significant problem.

Threshold for a recall process

The recall thresholds for Members of Parliament (MPs) and Members of County Assembly (MCAs) in Kenya present a nuanced balance between citizen participation and preventing misuse of the recall process. Examining the thresholds for MPs, the requirement for a recall petition mandates signatures from at least thirty percent of registered voters in the constituency.[43] This robust threshold ensures that any recall attempt is backed by a significant portion of the electorate, preventing frivolous or politically motivated endeavours. Additionally, the specificity and verification criteria demand a detailed petition, including names representing fifteen percent of voters in over half of the wards, enhancing the credibility of the recall initiative.[44] The 30-day window for the petitioner to collect and submit the list of names strikes a balance, allowing sufficient time for mobilisation without unduly prolonging the process.[45] The subsequent verification by the electoral commission within 30 days is a commendable effort, although potential challenges in efficiency and workload may arise.[46]

For MCAs, the recall thresholds mirror those of MPs, emphasising the need for substantial support within the county ward. The shared specificity and verification requirements, coupled with the same 30-day timeframe for submission, ensure a consistent and thorough approach.[47] The problem arises when it comes to the simple majority required to recall a Member of Parliament or Member of County Assembly. This threshold is a little bit high and we can adopt the United Kingdom system.

The High Court in the case of Katiba Institute & another v Attorney General &

[38]Ibid.
[39]Elections Act, sections 46(1) (b) (ii) and County Governments Act, section 28(1) (b) (ii).
[40]Katiba Institute & another (n 34 above) para 89.
[41]Ibid 73, para 90.
[42]Ibid 73, para 91.
[43]Elections Act, section 46(2b).
[44]Elections Act, section 46(3).
[45]Elections Act, section 46(5).
[46]Elections Act, section 46(6).
[47]County Government Act, section 28.

another noted a problem with the threshold by stating:

> *"Section 47(5) of the Elections Act provides that "a recall election shall be decided by a simple majority of the voters voting in the recall election." Section 29 (5) of the County Government Act has a similar provision. That notwithstanding, section 48 of the Elections Act provides that a recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency. Clearly there is ambiguity and vagueness in the two provisions. Will the recall be decided by a simple majority or will it only be valid if fifty percent of the voters in the constituency or ward agree with the recall"*[48]

The biggest critique of the court's decision is that it noted a problem without providing a solution. The easiest solution is to amend the Elections Act and make one provision. Borrowing from the United Kingdom's recall mechanism, which employs a 10% threshold for initiating a recall, could enhance inclusivity in Kenya's system.[49] While the lower threshold facilitates citizen participation, it also raises concerns about potential conflicts between majority and minority factions. To strike a balance, Kenya could contemplate adopting a more inclusive initiation threshold, akin to the UK's 10%, while introducing additional safeguards. One such safeguard could involve allowing a recall to be initiated only once, a provision aligning with the Elections Act and County Government Act, akin to the UK's non-recurrent recall process.[50]

Kenya's recall thresholds aim for substantial support and prevention of misuse, with room for improvement by borrowing from the UK's more inclusive initiation threshold. The careful consideration of potential conflicts and the introduction of a one-time initiation provision could fortify the recall process, striking a balance between citizen participation and the integrity of the democratic system.

Conclusion

Ultimately, the right to recall under Article 104 of the Kenyan Constitution is vital for democratic accountability. This is the time for GEN Z to exercise this right. Members of Parliament are representatives of the people and once they infringe the representative role by betraying the will of the sovereign, then they offend the Constitution. This analysis of Kenya's recall provisions for MPs and MCAs identifies hurdles like strict initiation thresholds and reliance on the High Court, which can delay citizen engagement. MPs have more restrictive recall grounds than MCAs. Adopting a simpler threshold, like the UK's 10%, and creating a quasi-judicial body to handle recalls could streamline the process. Adjusting recall timeframes to judicial realities would also improve effectiveness. Reforms are needed to keep recall a viable democratic tool, and meanwhile, citizens should use the existing process and push for amendments.

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Great thanks to Ms. Luciana Thuo and Advocate Joshua Maldizo Nyawa for their insights on this paper.
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[48] Katiba Institute & another v Attorney General & another [2017] eKLR.
[49] Recall of MPs Act 2015, section 5.
[50] Elections Act, section 45(5).

Ethnic tensions in Kenya cause for alarm

By Wanja Gathu

Trouble is brewing in Kenya with heightened inter-tribal animosity amid rising political temperatures. A look at social media today reveals open hostility, threats and intimidation conveyed through video clips, some of it directed at unnamed persons or groups of people deemed to be opposed to President William Ruto.

In one clip, leaders from the Rift Valley region, a perceived stronghold of President Ruto, are seen threatening violence against an unnamed person or people. Speaking in Swahili, a speaker is heard saying among other things, *"Wewe wachana na William Ruto kabisa…wakati ikifika, tutawashughulikia"*. Code to mean that one community will attack another at an appointed time. The targeted persons are warned to leave President Ruto alone or face the consequences.

The video is undated, and its source has not been verified but it sends a chilling message to Kenyans, who have experienced inter-ethnic violence, especially because the speakers, whose faces are visible, are known persons, associated with the 2007 post-election violence, that killed over a thousand Kenyans.

These threats cannot be taken lightly

because some of the individuals making these threats were incriminated in the International Criminal Court (ICC) investigations, which led to the indictment for crimes against humanity, of the immediate former and current President of the Republic of Kenya, Uhuru Kenyatta and William Ruto respectively.

Government officials, including Ambassador Francis Muthaura, the current chair of a commission to diffuse tensions, post the disputed 2022 elections, among other high-ranking officials in the current government also made the ICC list for criminal prosecution but the charges were eventually dropped for lack of evidence, and what ICC Prosecutor, Fatou Bensouda called lack of cooperation by the Kenya government.

The resurfacing of this video and other violent clips, threatening to stone, strip and drive out certain political leaders by other leaders, each rallying their communities to unite and help accomplish the mission is the clearest indicator yet, that all is not well.

Worse, the internet is awash with derogatory, abusive and unflattering memes and other dehumanising content directed at different Kenyan communities by others. This is the classic definition of hate speech; designed to inflame passions and incite ethnic hatred.

If nothing else, this is the loudest alarm bell needed to jolt government officials and institutions like the Kenya National Cohesion and Integration Commission (NCIC), charged with the mandate to monitor hate speech, de-escalate ethnic tensions and promote peaceful co-existence among Kenyans, to wake up from slumber and take urgent action.

This kind of tension was previously seen before the 2007 violence broke out, killing an estimated 1200 Kenyans and displacing hundreds of thousands of others, not to mention those who were maimed, and the

Ambassador Francis Muthaura

massive loss of property and livelihoods that followed the violence.

Lessons from the past

Seventeen years later, many of those affected and impacted by the violence are yet to recover from the trauma caused and still many of those internally displaced have not returned to their homes or been fully compensated or resettled elsewhere.

If nothing else, this is a clear demonstration of the damage that violence does to a people and country, and how hard it is to restitute; restore, compensate and rebuild communities destroyed by violence. Hence, the need to act swiftly and decisively to prevent such violence from ever happening again.

Whose responsibility is it?

The National Cohesion and Integration Commission, (NCIC) created in 2008 with the mandate to contain ethnic tensions

Samuel Kobia

post-2007 post-election violence, is currently headed by Samuel Kobia, together with the newly constituted panel of eminent persons, created post the 2022 elections, with a similar mandate and led by Ambassador Francis Muthaura, both have a duty and responsibility to steer Kenya out of troubled waters.

Article 25 (3) of the International Criminal Court statutes, recognises individual criminal responsibility for at the very least, aiding and abetting the commission of crimes against humanity.

Both individuals know only too well what can happen when ethnic tensions are allowed to boil over and spew deadly violence. Post 2007, Mr Muthaura found himself before the International Criminal Court charged with crimes against humanity, while Mr Kobia is a faith leader and a seasoned conflict resolution expert.

Both individuals have the experience and know how to not only resolve conflict but to also predict when trouble is brewing as it is right now in Kenya. They also have the power and resources necessary to arrest and contain the situation.

There can be no excuse whatsoever for a failure to take calculated and decisive steps to address rising ethnic tensions and to hold accountable, known warmongers and purveyors of hate, alongside people threatening to unleash violence on other Kenyans and disturb the fragile peace obtaining in the country today.

Should Kenya slide down the treacherous path of ethnic violence and civil strife, these individuals, alongside President William Ruto and other leaders will be held to account for complacency at the very least. This time, those charges will stick.

A moral army

Kenyan youth took to the streets to protest a punitive Finance Bill of 2024, that proposes extra punitive taxes on an already overburdened citizenry and allows the government to employ ruthless and regressive methods to force compliance and collection of taxes, to increase government revenue.

They want the Bill, which introduces 16% VAT on bread, among other basic commodities rejected in totality. But this protest is about much more than the Finance Bill.

In a nutshell, Kenyan youth are opposed to punitive taxation without accountability. They demand prudent management of existing public resources first and foremost and a stop to the plunder, theft and wastage of taxpayer's money displayed through extravagant government spending — frivolous foreign trips, renovations of State House and the residence of the Deputy President, undeserved perks for political leaders, whose costs run into billions of shillings, while the same government

Efforts to address ethnic tensions in Kenya have included constitutional reforms, devolution of power to local governments, and initiatives to promote national unity and inclusivity. However, the issue remains complex and challenging, requiring sustained efforts from both government and civil society to foster reconciliation, tolerance, and mutual respect among Kenya's diverse ethnic communities.

prescribes austerity measures for the rest of Kenyans.

These are valid concerns that every Kenyan can identify with and must be supported by every Kenyan of goodwill. Pity that elected representatives have chosen to stand with an oppressive government, against the Kenyan people who elected them and betrayed their trust.

By their defiance, the youth are denouncing the hypocrisy and the doublespeak displayed by President William Ruto, the cabinet, members of parliament, and senators, all the way down to the MCAs, which is abhorrent and unspeakable, to say the least.

End of an era

Coming out in large numbers countrywide, the youth have demonstrated unity of purpose that defies parochial interests and tribal politics that purport to parcel out parts of the country into fiefdoms, owned and operated by selfish tribal leaders at the detriment of the people.
One thing that is clear going forward, the youth have taken up their rightful positions as the leaders of today and not tomorrow. With sustained momentum, they will demolish and re-organise the social order to prioritise matters of interest to themselves.

Kenyan youth have the energy, the intellect and the vigour necessary to carry it forward. The best thing that the older generation and the ruling class can do, is to step aside.

The old order cannot win against the new, for the youth are akin to a moral army; united for a cause, greater than any one person. That cause is to liberate Kenya from a thieving autocracy that threatens to bankrupt and disintegrate the country. They will stop at nothing.

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Proposing the recognition of a parent-child privilege under Kenyan evidence law

By Roselyne Mwanza

Abstract

The best interests of the child principle underlines children's rights that are recognised under Kenyan law. As an overarching principle, it has implications both for the procedural and the theoretical aspects of the law. In recent years, many amendments have been made to improve the law's treatment of minors including a re-enactment of the Children's Act in 2022. Despite numerous amendments, there is yet to be a parent-child privilege geared towards the protection of children when they are in contact or in conflict with the law. Following this discovery, this study investigates what this privilege entails and why it is yet to be recognised under Kenyan law. Adherence to the best interests principle leads to the conclusion that this privilege should be recognised under the law to further guarantee the rights of children within families and when they come into conflict with the law. The study concludes by proposing the specific ways in which the privilege can be written into the law.

Keywords:
Parent-child privilege, best interests principle, evidence law and age of criminal liability

Parent-child privilege, also known as parent-child testimonial privilege or filial privilege, is a legal concept that protects certain communications from being disclosed in court proceedings. It is similar to spousal privilege but applies to communications between parents and their minor children.

I. Introduction

The family is the natural cell of society which enjoys recognition and protection by the state.[1] In so doing, the state commits itself to respecting the family as the basic unit for the social development of minors for the subsistence of society.[2] Additionally, the state recognises the right of a child (who is a member of the family) to parental care and protection.[3] Complementary rights which guarantee protection to the family are demonstrated below.

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[1]Constitution of Kenya 2010, art 45.
[2]Patrick Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press, Nairobi, 1st edn, 2014) 211. Also, United Nations Convention on the Rights of the Child, art14 (2).
[3]Constitution of Kenya 2010, art 53 (e).

An individual's right to privacy including information relating to their family and their private communications is guaranteed.[4] This right entails a person having the authority to conduct their personal affairs including within relationships free from unwanted intrusion.[5] The right to privacy is not absolute and therefore when legal reasons can be proven to exist it is interfered with.[6] To supplement the recognition of the right to privacy the law also recognises certain privileges such as the spousal privilege and the legal professional privilege[7] that allow a person to refuse either to testify or to produce an item as real evidence.[8] Such evidence, though relevant, may be inadmissible before a court of law on grounds of convenience and policy.[9]

Spousal privilege aims at encouraging confidence between spouses leading to the protection of the family unit.[10] This privilege only applies to communications made during the subsistence of the marriage.[11] The "attorney-client" privilege on the other hand was instituted to ensure effective representation of clients by their attorneys.[12] The privilege survives the end of the "attorney-client" relationship by disposal of a suit for example.

When it comes to children the best interests of the child are of utmost importance.[13] It is thus anomalous that Kenyan law does not recognise a "parent-child" privilege in the best interests of the child. While the right to privacy may be foundational to a privilege it does not guarantee one.[14] Additionally, though spousal privilege aims at ensuring harmony within the family it does not extend to "parent-child" relationships and is underinclusive of children who are not within intact families since it only applies within marriages.[15]

For the socialisation of a child to be successful, a bond of reciprocal trust and loyalty must be developed over time between the parent (or guardian) and the child.[16] The parent-child relationship subsists for a longer time when compared to other privileged relationships. A privilege would thus maintain the freedom of communication necessary for its healthy existence.[17]

An analysis of Kenyan legislation reveals that the law does not provide for a parent-child privilege but in failing to do so does not outrightly exclude the possibility of its recognition. The Evidence Act of 2014

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[4]Constitution of Kenya 2010, art 31.
[5]Kenya Human Rights Commission v Communications Authority of Kenya and 4 others [2018] eKLR para 53, 63.
[6]Constitution of Kenya 2010, art 25.
[7]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (2nd edn, Law Africa, Nairobi, 2016), see generally chapter 7. The law also recognises privileges for magistrates and documents containing sensitive information pertaining to the state, but these are not relevant to the current discussion.
[8]Evidence Act (Act No. 19 of 2014), ch V pt II. and Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (2nd edn, Law Africa, Nairobi, 2016) 167-172.
[9]*Phipson on Evidence* (18th edn, Sweet & Maxwell, London, 2013) 202.
[10]Ibid, 169.
[11]Ibid,168. Communications made prior to and after marriage are not covered.
[12]Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press, 2012) 607- the privilege applies in relation to communications between the client and the lawyer for the purpose of obtaining advice, communications in preparing for litigation as well as items referred to in preparation for litigation. This is also buttressed by Constitution of Kenya 2010, art 50 which affords a person adequate facility to prepare a defence. Exceptions to the privilege are under Evidence Act 2014, s 134 (1)- Communications between the client and the attorney are not privileged when they are made in furtherance of illegal purpose or when the attorney discovers that further crime has been committed since the commencement of their engagement.
[13]Constitution of Kenya 2010, art 53 (2).
[14]Daniel Cofer, 'Parent-child Privilege: A Constitutional Right or Specious Analogy?' (1979) 3 University of Paget Sound Law Review 182.
[15]Maxwell Radin, 'The Parent-child Privilege' (1984) 4 Brigham Young University Law Review 608.
[16]The Harvard Law Review Association, 'Parent-child Loyalty and Testimonial Privilege' (1987) 100 Harvard Law Review 916.
[17]Bruce Lemons, 'From the Mouth of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege' (1978) 4 Brigham Young University Law Review 1010.

Children's Acts often outline measures to safeguard children from abuse, neglect, exploitation, and other forms of harm. They establish frameworks for child protection services, intervention in cases of abuse or neglect, and provisions for foster care or alternative care arrangements when necessary.

recognises several privileges including attorney-client privilege, the spousal privilege, the spousal privilege and the privilege against self-incrimination[18]. These privileges accord further protection to supplement the privacy provisions to the parties to such relationships.

The Children's Act of 2022 provides that whenever children come in conflict with the law they are to be distinguished, in terms of treatment, from adults.[19] For purposes of this entire article, the child who is being referred to is one who has reached the age of criminal responsibility which is fourteen and is thus eligible to be tried in accordance with the provisions of the law.[20] The child when in conflict with the law is also guaranteed a right to privacy.[21] Interestingly the CA makes room for assistance by parents, guardians and fit persons to the child during such proceedings.[22] However, the CA does not go as far as to guarantee a parent-child privilege. Internationally, the United Nations Convention on the Rights of the Child, the African Charter on the Rights and the Welfare of the Child provide protections for the welfare of the child such as privacy and, right to culture among others but do not provide for the parent-child privilege.

This paper will investigate whether the law should recognise a parent-child privilege in Kenya in the best interests of children under

[18]Evidence Act 2014, s 127.
[19]Children's Act 2022, s 76.
[20]Children's Act 2022 , s 78.
[21]Children's Act 2022, s 220.
[22]Children's Act 2022, s 222.

the law of evidence and if so, how this should be done.

II. The best interests principle

The origins of the best interest principle seem to be the Geneva Declaration of the Rights of the Child which states that 'humankind owes the child the very best it can give'.[23] The foundation for the principle is in the Convention on the Rights of the Child which stipulates that in matters concerning the child, their interests shall be of primary importance.[24] This principle is also codified under Article 53 of the Constitution of Kenya 2010 and the Children's Act of 2022.

The principle of the best interests of the child in Kenya was interpreted by the court in the case *AOO & 6 others v Attorney General and another*[25] where in defining the best interest of the child, the court reiterated the vulnerability of children in the society owing to their limitation in age.[26] Additionally, the court stated that the principle of the best interests of the child was put into the Constitution of Kenya 2010 by its drafters that the justice system treats children in conflict with the law with dignity and worth.[27] The court also stated that the principle is meant to ensure the reintegration of a child back into society in line with restorative justice.[28]

The case of *AOO & 6 others v Attorney General* and another shows the importance that the courts attach to the principle of the best interest of the child. Not only does the court consider the welfare of the child within the justice system but also beyond it. This is shown when the judge considers the effects of legal provisions on the reintegration of the child back into society.[29] The Courts are keen on the welfare of the child paving way for the recognition of the parent-child privilege in Kenya under the best interests principle.

III. Relevant provisions under the law of evidence/Contextualising privileges under the law of evidence

The law of Evidence regulates how facts are proved in courts.[30] The history of privileges and evidence law has many facets to it. It is said that the concept of privileges under the Law that it dates back to ancient Rome.[31]

Generally, under evidence law, every person is liable to give testimony upon all facts inquired in a court of justice.[32] Kyalo Mbobu defines a privilege as a right conferred to a person permitting him to refuse either to testify in a specific matter or produce a certain item as real evidence.[33] This definition is fitting and is adopted for this paper as it rightly implies that a privilege is not merely a rule of evidence but rather a substantive legal right.[34] Restricting the definition of privileges to rules of evidence ignores the role of privilege outside adversarial proceedings.[35] Common law recognises a few privileges including

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[23]Jean Zermatten, 'The best interests of the child principle: Literal analysis and Function' [2010] 18, International Journal of Children's Rights, 484.
[24]United Nations Convention on the Rights of the Child1989, art 3. See also:African Charter on the rights and Welfare of The Child 2002 art 4.
[25]AOO & 6 others v Attorney General and another eKLR (2017).
[26]Ibid.
[27]Ibid.
[28]Ibid.
[29]Ibid.
[30]Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (9th edn, Oxford University Press 2012), 2.
[31]Max Radin, 'The privilege of confidential communication between lawyer and client' (1928) 16 California Law Review 487.
[32]John Wigmore, Evidence in trials at common law (Aspen Publishers, New York, 1940) 527.
[33]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (Law Africa Publishing, Nairobi, 2011) 151.
[34]Phipson on Evidence, 18th edn (Sweet and Maxwell, London, 2013) 679.
[35]Ibid, 679.

attorney-client privilege and the spousal privilege.[36] The proposed parent-child privilege would fall under the category of privileges meant to protect participants in relationships worth the state's protection.

Several reasons motivate the recognition of evidentiary privileges. These include but are not limited to the maintenance of relationships deemed important in society, the need for proper and fair trials in the law and the proper representation of clients by their attorneys.[37] By extending protection to communications made in confidence, the privacy of the relationship under scrutiny as well as open communication between those in similar relationships is preserved.[38]

A closely related evidential concept that must be understood at this point is that of the competence and compellability of witnesses under the Law. Competence under the Law denotes the ability, capacity or qualification of a witness to give evidence when called upon in a court of law.[39] Compellability more importantly responds to the question of whether a witness deemed competent can be ordered (forced) by a court of law to give evidence.[40] Generally, under common law, all witnesses are competent and compellable.[41] However, certain exceptions may relate to the accused and their spouse when a privilege exists.[42]

The concept of competence and compellability is related to privileges because it can also exclude a person from the duty to testify about certain occurrences in court should they fit within the specified categories of witnesses. If a parent-child privilege were recognised, a parent/child would not be a compellable witness against their parent/child. Notably, there is some hesitation around the recognition of new privileges as they take away relevant information from the evidential equation and go against the rule that the public is entitled to each person's evidence.[43]

Having laid out these foundational concepts, this paper will expound on what a parent-child privilege entails in two ways: by examining the parent-child privilege under early Roman society to give a historical understanding of the privilege. Secondly, the parent-child privilege will be compared to the spousal privilege, which the paper argues is a closely related concept.

i.Early h istory of the parent-child privilege under Roman Law

Like most societies, the Romans understood and fully embraced the reality that the foundation of society is hinged upon the family unit.[44] Gaius defines marriage (which serves as a foundation for the family) as the joining together of a man and a woman leading to the implication of a joint lifestyle. Kenya's Marriage Act 2014 defines marriage as a voluntary union between a man and a woman whether monogamous or polygamous.[45] These two definitions of marriage (the Roman and the Kenyan) are similar since the primary parties to the union are the man and the woman.

The Roman state was not allowed to extend its long arm into intra-familial

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[36]John Wigmore, *Evidence in trials at common law* (Aspen Publishers, New York, 1940) 526.
[37]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (2nd edn, Law Africa, Nairobi, 2016), 157.
[38]Susan Levine, 'The child-parent privilege: a proposal' (1979) 47 Fordham Law Review, 772.
[39]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (2nd edn, Law Africa, Nairobi, 2016), 135.
[40]Ibid.
[41]Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (9th edn, Oxford University Press 2012), 118.
[42]Ibid.
[43]Robert Maxwell, 'The parent-child privilege'(606).
[44]Wendy Watts, 'The parent-child privileges: hardly a new or revolutionary concept' (1986) 28 William and Mary Law Review 592.
[45]Marriage Act 2014, s 3.]

The general idea behind parent-child privilege is to encourage open and honest communication within families by ensuring that children can confide in their parents without fear that their conversations may be used against them in legal proceedings. This privilege recognizes the importance of the parent-child relationship and aims to uphold the privacy and trust within that relationship.

communication to enable effective law enforcement.[46] The *Roman familia* consisted of all persons who were subjected to the power of a pater *familias* (head of the family).[47] Persons could be related to the *pater familias* by virtue of marriage, parentage and adoption.[48] In Kenya, a family may consist of a husband, a wife, children, relatives and others sharing living quarters with the family such as domestic workers.[49] In this regard, the *Roman Familia* and the Kenyan household bear some similarities in the members of the family unit being a mother, father, children and other members such as adopted children. The general formulation of a family as a group of people related by blood or through marriage serves to further connect the Roman Familia and the Kenyan family unit.[50]

Early Roman Law took cognisance of the rule of *testimonium domesticum* which stipulated that parents, children, patrons, freedmen, and slaves, who constituted the Roman household,[51] could not be compelled to testify against one another.[52] What was the reasoning behind the *testimonium domesticum* rule?

Firstly, the Romans held a strong belief that it was every citizen's mandate not to

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[46]Wendy Watts, 'The parent-child privileges: hardly a new or revolutionary concept' (1986) 28 William and Mary Law Review 592.
[47]Tellegen-Couperus O, *A Short History of Roman Law*, 2nd edn (Routledge, New York, 1993) 6.
[48]Ibid.
[49]Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children* (Law Africa, 2016) 3.
[50]Ibid, 1.
[51]Paul du Plessis, *Borkowski's Textbook on Roman Law* (5th edn, Oxford University Press, Oxford, 2018) 34.
[52]Wendy Watts, 'The parent-child privileges: hardly a new or revolutionary concept' (1986) 28 William and Mary Law Review 592.

It's important to note that the scope and application of parent-child privilege can vary significantly depending on jurisdiction. Not all jurisdictions recognize this privilege, and even where it is recognized, there are often exceptions and limitations.

violate the faith upon which the family rested.[53] Secondly, the general belief in Roman society was that the testimony of family members was of insignificant value as family members who testified had a very strong motive for either misstatements or perjury.[54] Additionally, those who went against the requirements of the rule and decided to testify anyway were considered disreputable persons who were willing to violate the family's solidarity.[55] Lastly, in Roman society, it was taken as a given that the existence of the rule would counter the erosion of familial relationships.[56] The similarities between the Roman and the Kenyan family structures substantiates borrowing from the early Roman society's understanding of the parent-child privilege.

ii. Understanding the parent-child privilege through the lens of the spousal privilege

A brief analysis of the spousal privilege which bears similarity to the parent-child privilege will enable a better understanding of the latter. Importantly, both these privileges are housed under the institution of the family, as spouses are the basis for the foundation of the family while children become a part of the existing family when they are born. Both of these relationships are considered socially desirable[57] and are ideally couched in love, and it is largely assumed that in both there is an expectation that revelations in confidence will be maintained in that state.[58] Lastly, the Kenyan state is interested in protecting and promoting the relationship between spouses and parents and their children.[59]

Spousal privilege which protects the right to confidentiality of communications made within a marriage[60] is aimed at fostering communication within marriages.[61]

Borrowing from the *testimonium domesticum* rule in Roman law and the spousal privilege under Kenyan Evidence law, the parent-child privilege would therefore be defined as an evidential privilege existing between a parent/

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[53]Ibid.
[54]Ibid.
[55]Ibid.
[56]Ibid.
[57]Susan Levine, 'The child-parent privilege: a proposal' (1979) 47 Fordham Law Review 780.
[58]Ibid.
[59]Maxwell Radin, 'The parent-child privilege' (1984) 4 Brigham Young University Law Review 616.
[60]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (2nd edn, Law Africa, Nairobi, 2016), 155.
[61]Ibid.

guardian and their child that protects the confidentiality of communications within the relationship. It will be proposed that this privilege should also apply in two ways: by excluding adverse testimony and prohibition of the revelation of any communications made in confidence as earlier proposed in the spousal privilege.

iii. Arguments for and against the parent-child privilege

According to John Henry Wigmore (a distinguished scholar in evidence law), there are four fundamental conditions necessary for the establishment of an evidentiary privilege under common law. A significant number of scholars refer to the four Wigmore criteria in analysing whether a parent-child privilege should be recognised.[62] Scholars who think that the criteria has been met vouch for the recognition of the privilege and those who do not argue against it.

Wigmore's criteria stipulates that firstly, the communications must originate in confidence that they will not be disclosed. Secondly, this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. Thirdly, the relation must be one which in the opinion of the community ought to be sedulously fostered. Lastly, the injury that would insure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[63] These conditions are conjunctive but the level of certainty needed for them to qualify a privilege is not very straightforward as demonstrated below.

These conditions are present in the recognized common law privileges.[64] While the presence of the conditions is not under contention the level of certainty required is. It is worth noting that even in the attorney-client privilege which is one of the most indisputable privileges, some doubt still exists as to whether the fourth criterion has been sufficiently met.[65] Additionally, in the spousal privilege, there is also some dispute as to the certainty of the fourth condition.[66] Therefore, even in the 'classic' evidentiary privileges, the level of certainty to which the mentioned criterion has been met is not to a full extent. Importantly, despite the doubt shed on whether the fourth condition has been met in these instances, the privileges are still recognised under the law.

Some scholars stipulate that the parent-child privilege has met the Wigmore criteria. Firstly, in a situation where a parent is a witness in a case, then confidentiality of their communications would shift from being a luxury to a necessity as is required under the criteria.[67] Secondly, confidentiality is essential to the effective existence of a parent-child relationship especially when it is expected by one of the parties.[68] It has been said that a bond of loyalty develops between a parent and their child owing to the strong stake that parents have in the wellbeing of their children.[69] This answers the doubt about this privilege when assessed using the second step of the criteria.

[62]The Wigmore commentaries could be considered the most authoritative commentaries on evidence law that flows from common law.
[63]John Wigmore, *Evidence in trials at common law* (Aspen Publishers, New York, 1940), 1, 527.
[64]Ibid, 528.
[65]Ibid.
[66]Ibid.
[67]Maxwell Radin, 'The parent-child privilege' (1984) 4 Brigham Young University Law Review, 615.
[68]Ibid.
[69]Harvard Law Review Association, Parent-child Loyalty and Testimonial Privilege' (1987) 100 Harvard Law Review 918 .

parent-child privilege is a legal protection designed to preserve confidentiality in communications between parents and their minor children in certain circumstances, with the goal of promoting family trust and openness.

Most communities would be inclined to believe and even advocate for the fostering and even the strengthening of the parent-child relationship.[70] Therefore, the third criterion is also met. Unsurprisingly, like the spousal and attorney-client privileges, there is contention as to whether and to what extent the fourth criterion has been met. To reiterate, the fourth criterion requires that the injury inuring to the relationship be greater than the benefit that would be derived from a revelation of the communication.[71] This requirement is hard to analyse owing to among other factors the diversity of child-parent relationships for example adoption or step - parenthood in existence.

Daniel Coburn argues that a parent's testimony concerning matters the juvenile declined to disclose in court amounts to self-incrimination of the child as the revelation of information to the parent was based on a natural belief that such conversations are private.[72] Another scholar doubts the credibility of testimony obtained from parents by suggesting that some parents would rather perjure themselves than testify against their children.[73]

In making arguments for the policy reasons behind the recognition of the privilege, most scholars use the natural repugnancy argument. This argument states that members of the society would be

[70]Maxwell Radin, 'The parent-child privilege' (1984) 4 Brigham Young University Law Review, 615.
[71]John Wigmore, Evidence in trials at common law (Aspen Publishers, New York, 1940),1, 528.
[72]Daniel Coburn, 'Child Parent Communications: Spare the Privilege Spoil the Child' (1970) 74 Dickinson Law Review 4',600.
[73]Catherine Ross, 'Implementing Constitutional Rights for Juveniles' (2003) Stanford Law and Policy Review 86.

bewildered at the thought of the possibility of a parent testifying against their child in court and vice versa.[74]

Other scholars argue against the recognition of a parent-child privilege by stating that it cannot be proven that a child's relationship with their parent will be improved if the privilege is recognised.[75] Cofer doubts that children reveal themselves to their parents in the first place and further that parents testifying against their children would result in conflict within the family unit.[76] He also rebuts that the idea of parents appearing against their children is repugnant to society and in doing so he questions why it has not already been recognised if this were the case.[77] Lastly, Cofer argues that the privacy assertion does not suffice as justification for the privilege because if it were, virtually all testimony would be privileged.[78]

Whether all the Wigmore criteria have been met with certainty in other privileges such as the spousal and the attorney-client privilege leading to their recognition under common law is questionable. In the author's opinion, the recognition of the parent-child privilege should not fail simply because there is uncertainty as to whether the Wigmore criteria have been met.

iv. The rationale supporting the recognition of the parent-child privilege in Kenya

The Kenyan family unit may consist of parents, children and occasionally dependent relatives.[79] From a case study in Kenya, it was found that strong and durable marriages and families hold in high esteem the qualities of love, mutual respect, valuing children, providing for the family and communication.[80] Specifically, communication was seen to be a significant bonding factor between parents and children as well as their relatives.[81] This finding responds in the affirmative to the question of whether there is a need for a parent-child privilege in Kenya.

Children are meant to grow and develop in many aspects within the family unit. The relationship between parents and their children is founded on love and trust.[82] Whenever they are faced with serious difficulty, children's first reaction is to turn to a parent or a guardian necessitating the need for free flow of information.[83] Should a child feel unable to discuss its problems with its parents, this may be an indication that this all too important relationship is jeopardised.[84]

Like other families in different societies, the Kenyan family faces a myriad of challenges. Importantly, crimes by children affect the family and these can be attributed to times when the family is experiencing challenges such as adjusting to among other things different scenarios shaped by the labour market, rapid social changes and the

[74]Susan Levine, 'The child-parent privilege: a proposal' (1979) 47 Fordham Law Review, 776.
[75]Clark John, 'Questioning the Recognition of a Parent-Child Privilege' (1980) 45 Albany Law Review 1.
[76]Daniel Cofer, 'Parent-child Privilege: A Constitutional Right or Specious Analogy?' (1979) 3 University of Paget Sound Law Review 180.
[77]Ibid,179.
[78]Ibid, 182.
[79]Jane Rose Njue, Dorothy Rombo, and Lucy Ngige, 'Family Strengths and Challenges in Kenya' (2007) 54 Marriage and Family Review.
[80]Ibid, 58.
[81]Ibid, 60.
[82]Yolanda and Thomas Martyn, 'To Tell or Not to Tell - An Analysis of Testimonial Privileges: The Parent-child and Reporter's Privileges' (1993) 1 St. John's J Legal Comment 179.
[83]Ibid.
[84]Ann Stanton, 'Child-parent privilege for confidential communications: An examination and proposal' (1982) 16 Family Law Quarterly 7.

requirement of childhood education.[85] Some of the common crimes committed by child offenders such as stealing, drug-related offences and arson are connected to family problems.[86]

In cases where minors are in conflict with the law, forced disclosure on the part of their parents may result in them becoming suspicious of the legal system and society in general.[87] The children may also lose respect for their parents and their family.[88] Additionally, some commentators link positive family interaction with the reduction in rates of recidivism.[89] Catherine Ross argues that the meaningful exercise of a minor's rights is hinged on the existence of the parent-child privilege.[90] For these reasons, a parent - child privilege should be implemented under Kenyan law.

V. proposed provisions of the parent-child privilege under Kenyan evidence law

i. Who qualifies as a parent or a child?

Today's fast-changing family structures make it a difficult task to determine who gets to be shielded under this privilege.[91] As earlier mentioned, Kenya's family situation is unique as most families have a relative or two living in their care for, among other reasons, ease of access to educational institutions.[92] Both the definition of a parent and a child are thus important to lay down to determine the scope of this privilege.

The CA defines a parent as the mother or father of a child including those liable by law to maintain the child and entitled to their custody.[93] This broad definition of a parent is laudable since it will effectively cover anyone having a parental relationship with the child under the parent-child privilege.[94] This definition is meant to cater for birth parents, adoptive parents, stepparents and legal guardians. Additionally, the court may use its discretion to recognise those who have acquired the right to act as a parent in special circumstances.[95] This broad definition accorded to a parent necessitates that the privilege only be applicable to communications made at the time when the parent and child relationship existed.[96]

ii. What qualifies as confidential communication?

A confidential communication has been defined as a message which is intended to convey meaning between a parent and their child with the reasonable expectation that said message will not be revealed to third parties.[97] Communication may be deemed confidential whenever it is made by a child to their parents when they need advice and guidance. Upon a determination of the lack

[85]Henry Thuku, 'Factors contributing to crime among juveniles: A case of Majengo, Nyeri County, Kenya' (2017) ResearchGate, 4.
[86]Joyce Nkirote, 'An analysis of the legal framework in protecting the rights of child offenders in Kenya' (2016) University of Nairobi 43.
[87]Yolanda and Thomas Martyn, 'To Tell or Not to Tell - An Analysis of Testimonial Privileges: The Parent-child and Reporter's Privileges' (1993) 1 St. John's J Legal Comment, 177.
[88]Ibid.
[89]Ibid.
[90]Catherine Ross, 'The Parent- child privilege in context', George Washington Law School Legal Studies(2003) 6.
[91]Tyson Covey, 'Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege' 1990 U. Ill. L. Rev. 879, 900.
[92]Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children* (Law Africa, 2016), 240.
[93]Children Act 2022, s 2.
[94]Wendy Watts, 'The parent-child privileges: hardly a new or revolutionary concept' (1986) 28 William and Mary Law Review,625.
[95]Ibid, 619.
[96]Ibid, 625.
[97]Tyson Covey, 'Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege' (1990) University of Illinois Law Review, 900.

The Kenyan legal system recognizes the importance of confidentiality and privacy in familial relationships. Communications between parents and their children are generally considered private, and there is an expectation that these communications will not be disclosed without valid legal reasons.

of this essential element of confidentiality then the privilege should not apply.

iii. What are the exceptions to the proposed privilege?

Some of the exceptions that can be recognised for the parent-child privilege are already found in the Evidence Act of Kenya. Under section 124 of the Act, the spousal privilege is subject to several exceptions which can be applicable *mutatis mutandis* to the parent-child privilege owing to the vast array of similarities that exist between them. These exceptions are: the inapplicability of the spousal privilege whenever the offence under trial is one under the Sexual Offences Act or in respect of an act or omission which directly affects the person or property of the parent or child in this instance.[98] These exceptions are allowed since the perpetrator of the crime should not claim the privilege under either the parent-child or the spousal privilege. Generally, the privilege applies to cases where the child is in conflict with the law.

According to other researchers in this field, some other exceptions other than those included in the Evidence Act may be applicable. Firstly, the parent-child privilege should only exist when mutually asserted by both the parent and the child. Communications that revolve around the planning of future crimes or fraud are outside the scope of the privilege since they would encourage the commission of crimes.[99] These exceptions ought to

[98]Evidence Act 2014, s 127 (3).
[99]Ibid.

In practice, Kenyan courts may consider principles of confidentiality and privacy when evaluating evidence or testimonies involving communications between parents and children. However, the specifics of how these principles are applied can vary depending on the circumstances of each case and the interpretation of existing laws.

be allowed upon the recognition of this privilege in evidence law since the long-term interests of the child are most efficiently served by compelling testimony in these instances.[100]

iv. Who may waive the privilege?

In discussing which party should be allowed to waive the privilege a preliminary discussion on its importance is critical. In instances where parents are allowed to waive the privilege, this is a direct ode to parental-autonomy whilst making child-rearing decisions in their best interest.[101] However, this opposes the position under the spousal privilege where only the spouse who made the communication can permit disclosure.[102] Children should also have the authority to waive the privilege as it shows that they too have some power to determine whether they wish to protect confidential communications to parents.[103] Therefore, both parties should be allowed by the law to waive the privilege.

In conclusion, several important factors must be highlighted while legislating parent-child privilege. This must be done to avoid creating generalised privileges which may impede the truth-finding process at the courts when such need arises. Outside of this, with the aim of the privilege in mind, the proposed provisions guarantee with a level of certainty the bounds of protection for parties whose relationships will benefit from the existence of the privilege.

VI. Recommendations

Following the investigations of this paper, the author recommends that a parent-child privilege be recognised under Kenyan evidence law to further ground the best interests of the child especially when they conflict with the law. This does not call for a separate act altogether but a recognition of the proposed parent-child privilege under the Law of Evidence Act and the Children's Act of 2022. The privilege would secure communications within the family not only when children come in conflict with the law but also during the day-to-day interactions with the family. Like the spousal privilege, the parties to the privilege may not always be aware of its existence but they may come to need it when future disputes arise. Lastly, the recognition of this privilege under the law shows the state's commitment to the protection of every member of the family unit.

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[100] Tyson Covey, 'Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege' (1990) University of Illinois Law Review , 910.
[101] Ibid, 911.
[102] Evidence Act 2014, s 130 (1).
[103] Tyson Covey, 'Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege'(1990) University of Illinois Law Review, 911.

Insights into the business and human rights regime in Kenya

By Valentine Kasidhi

Abstract

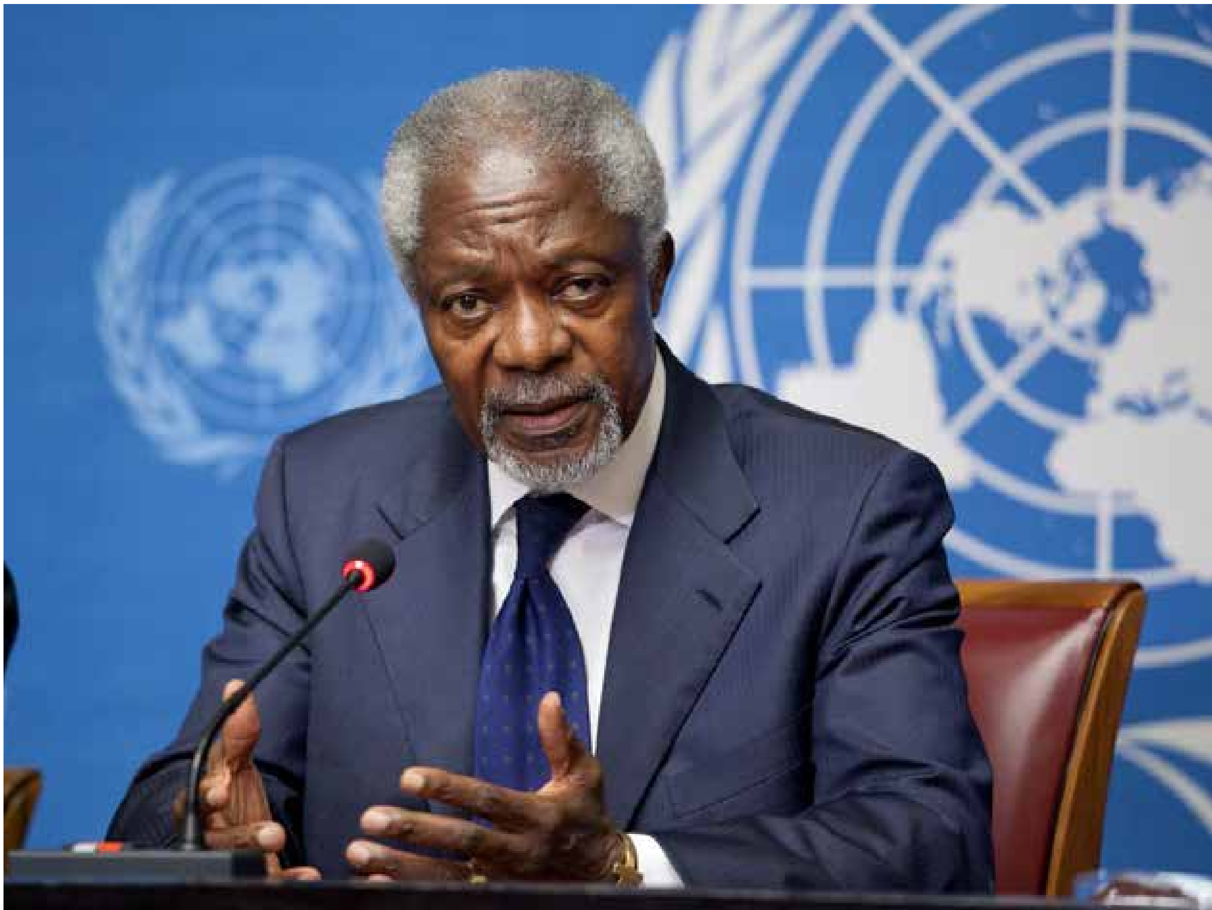
It is established that business activities can significantly impact the lives of those around them. The impact of corporations on fundamental human rights can be harmful and positive. While businesses can positively influence society through social development projects, employment opportunities, and infrastructure improvement, corporations can also adversely affect the livelihoods of adjacent communities. In addition, international human rights treaties impose legal obligations on States only, whereas private entities such as corporations are exempt from legal responsibility to observe human rights. Consequently, there has been a long-standing debate about whether corporations should have legal obligations to respect, protect, and promote human rights, with one side of the argument insisting that companies should remain exempt from such legal obligations. As a result, in 2011, the UN Guiding Principles on Business and Human Rights were conceived. This paper elaborates on the Three Pillars of the UN Guiding Principles and their legal implications for the State and companies. Furthermore, the study reveals that while States, such as Kenya, have taken bold steps to develop a National Action Plan on Business and Human Rights, numerous pitfalls derail the adoption of the UN Guiding Principles by both the State and the companies. This paper goes to length to discuss such challenges. The study then concludes by suggesting possible solutions that could accelerate the attainment of corporate responsibility to observe human rights in Kenya.

Human rights are the fundamental rights and freedoms that belong to every person in the world, from birth until death. These rights are based on principles of dignity, equality, and mutual respect, which are shared across cultures and religions.

Background and context of the UN Guiding Principles on Business and Human Rights

"I call on you— individually through your firms, and collectively through your business associations—to embrace, support, and enact a set of core values in the areas of human rights, labour standards, and environmental practices"- (Kofi Annan)[1]

[1] 'Kofi Annan's Address to World Economic Forum in Davos | United Nations SecretaryGeneral (Un.org2021) <https://www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos> accessed on April 25, 2024.



The late Kofi Annan

The statement above was the clarion call made by the then UN Secretary-General, Kofi Annan, in a conference with business leaders in 1999. As a result of this conference, the UN Global Compact was established to' give a human face to the global market.' Being the turn of the millennium, this was a clarion call to all business leaders to prioritise social justice over profit and deeds over words. However, it took another six years to establish a governance structure that involved stakeholders and participants at both the global and national levels in the implementation process of the UN Global Compact. The Global Compact urged businesses to take responsibility for a shared, sustainable world. It encouraged firms to align their strategies and operations with the ten principles on human rights, labour, environment, and anti-corruption to strategise towards achieving broader societal goals such as the UN Sustainable Development Goals through innovation and collaboration.[2] For a while, the UN Global Compact was the key normative instrument, not binding but enjoining businesses and human rights.

In 2005, Prof. John Ruggie was appointed as a Special Representative of the Secretary-General, with the significant task of identifying and clarifying corporate responsibility and human rights issues. After six years of extensive consultations and thorough research with businesses, governments, civil society, affected

[2]'The Ten Principles | UN Global Compact' (*Unglobalcompact.org*,12 January 2023) <https://www.unglobalcompact.org/what-is-gc/mission/principle accessed on February 1 2023.

communities and individuals, lawyers, investors, and other stakeholders, Prof. John Ruggie developed the UN Guiding Principles on Business and Human Rights. Subsequently, in June 2011, the Human Rights Council endorsed the Guiding Principles, thus establishing the instrument as the first influential international framework addressing the impact of businesses on human rights. Additionally, the guiding principles apply to states and businesses, outlining their obligations towards addressing human rights risks in business operations.

The UN Guiding Principles on Business and Human Rights

Based on the "protect, respect, and remedy" framework, the Guiding Principles on Business and Human Rights provide 31 principles; these principles can be summarized in the following three significant norms:[3]

- All states are obligated to **protect** their citizens against corporate violations of human rights
- Companies must **respect** human rights, refrain from infringing human rights in all their subsidiaries, regardless of size and industry, and deal with any ramifications arising from a violation. Whether or not States fulfill their commitments have no bearing on this corporate duty.
- Victims of human rights violations must have access to **effective remedies** through judicial and administrative grievance processes in cases where human rights abuse occurs.[4]

State responsibility to protect

The guiding principles affirm the State's obligation to protect individuals from corporate human rights infringements by taking appropriate steps to prevent, investigate, punish, and remedy such human rights abuse through legislation, regulations, effective policies, and adjudication. This duty is derived from international human rights treaties ratified by the state and national legislation and guidelines.[5]

The state's duty to protect human rights in business operations is categorized into operational principles. To begin with, according to Principle 3, state obligation regarding corporate human rights includes enacting and enforcing appropriate legislation and regulations that bind companies to respect human rights; therefore, establishing a regulatory regime that facilitates corporate respect for human rights and guiding companies on their responsibilities.[6] It is noteworthy that enforcement mechanisms established by the state entail administrative and adjudicative avenues, where appropriate. Additionally, the commentary to Guideline 3 encourages the state to revise its legislation and policies, considering the dynamic circumstances and ensuring an effective legislative, policy, and regulatory mechanism that promotes corporate respect for human rights. In other

[3]Sorcha MacLeod, 'Towards Normative Transformation: Re-Conceptualising Business and Human Rights' (2017) <https://www.semanticscholar.org/paper/Towards-normative-transformation%3A-business-and-MacLeod/0a8e2221e6d74e9f2bd31c6e6e424b35677395fb> accessed 10 May 2024.

[4]Andreas Heinemann and Ulrich Fastenrath, 'Business Enterprises in Public International Law: The Case for an International Code on Corporate Responsibility' [2011] Oxford University Press eBooks 718 <https://academic.oup.com/book/7421/chapter-abstract/152350233?redirectedFrom=fulltext> accessed 10 May 2024.

[5]Ni Ketut Supasti Dharmawan and others, 'The Guiding Principles on Business and Human Rights: National Action Plans toward Corporation Responsibility' (2018) 4 Hasanuddin Law Review 123 <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/1480> accessed 10 May 2024.

[6]UNGPs.pdf, '2_UNGPs.pdf' <https://drive.google.com/file/d/1J6nd6h1gp6L3kBy0oSjt3Y01WL_poozX/view> accessed July 12, 2023.

words, more regulations are needed, and having the right combinations of legislation and regulations in place is also utterly crucial. A legal framework that effectively and actively guides companies towards corporate responsibility for human rights.[7]

Secondly, according to Principle 4, state regulation also covers state-owned companies and parastatals whose commercial operations may substantially impact human rights.[8] The state-business relationship also includes the state's procurement procedures. It is worth considering that, in the case of state-owned corporations and parastatals, human rights abuses in such enterprises may amount to the state's violation of its obligation under international human rights law since the states are the primary duty-bearers of international human rights law.

Principle 5 encourages the States to exercise adequate oversight when contracting with private enterprises for services that may impact the enjoyment of human rights and freedoms. Privatizing essential services means that the State relinquishes its international human rights obligations. Consequently, states should emphasise their human rights obligations in the relevant service contracts and enabling legislation.[9] Also, the states should effectively oversee the business operations of such contracted companies through adequate monitoring and accountability mechanisms.

Principle 7 also forbids the States to initiate policy direction, enforcement mechanisms, and logistical assistance to prevent corporate human rights violations in conflict-prone regions. These affected areas provide a conducive environment for corporate human rights abuses. Finally, the State obligation to ensure corporate responsibility also entails ensuring that policies are coherent across government agencies, as enunciated in Principle 8.[10] These government agencies, departments, or institutions are tasked with shaping business conduct nationally, ranging from labour departments to agencies responsible for environmental regulation and agencies that regulate securities, investment, and insurance. The state should create awareness in all state departments about its human rights obligations and ensure they are observed through capacity building, training, and logistical support.

It is worth noting that while the Guiding Principles do not categorically command the States to develop national action plans (NAPs), international and regional organisations have encouraged states to develop NAPs on business and human rights to implement the Guiding Principles at the national level.[11] For instance, the Working Group on Business and Human Rights has recommended that all states develop NAPs. At the same time, the European Commission and the Council of Europe have invited members of the European Union to establish NAPs. National action plans are instrumental in coordinating implementation measures of the Guiding Principles in the relevant state departments. NAPs provide a blueprint for national stakeholder discourse and a structured and flexible way of identifying national policies

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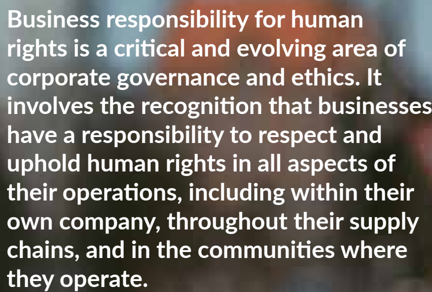
[7]UNGPs.pdf, <https://drive.google.com/file/d/1J6nd6h1gp6L3kBy0oSjt3Y01WL_poozX/view> accessed 12 July 2023.
[8]Ibid., Principle 4
[9]Ibid., Principle 5
[10]FAQ_PrinciplesBussinessHR.pdf, <https://drive.google.com/file/d/1A-gF599XKHD2hcmz4rBWxxDquGoAoqGS/view> accessed 12 July 2023.
[11]International Federation for Human Rights, 'A Guide for Victims and NGOs on Recourse Mechanisms' (Corporate Accountability for Human Rights Abuses – FIDH2016) <https://corporateaccountability.fidh.org/the-guide/intergovernmental-mechanisms/the-united-nations-system-for-the-promotion-and-protection-of-human-rights/the-charter-based-mechanisms/the-special-procedures-of-the-human-rights-council/> accessed 10 May 2024.



Business responsibility for human rights is a critical and evolving area of corporate governance and ethics. It involves the recognition that businesses have a responsibility to respect and uphold human rights in all aspects of their operations, including within their own company, throughout their supply chains, and in the communities where they operate.

and regulations. This makes tracking the government's progress in implementing the UNGPs easier.

The guiding premise is that States must uphold their duties under international human rights law by adopting the appropriate measures to effectively prevent, probe, and punish corporate human rights violations. To guarantee the success of their efforts, states may find it necessary and beneficial to create an overarching plan and inform businesses and other stakeholders of their objectives and actions.

Corporate duty to respect

The standard of business responsibility for human rights is to respect human rights. The UNGP further elaborates that companies must know their impact on human rights, avoid human rights violations, and address any potential or actual effect on the human rights of employees, consumers, local community members, or any other group. Companies should also endeavour to mitigate any adverse impact on human rights in their operations, production lines, or services through business relationships. If businesses find they have caused or contributed to harm, they must provide for and actively participate in an effective remedy procedure. The Guiding Principles further clarify that the corporate duty to respect human rights is independent of the States' ability or preparedness to fulfill their obligation to protect human rights.

Unsurprisingly, the corporate duty to respect only arises out of a vacuum. The corporate duty to respect is premised on the Universal Declaration of Human Rights, which forbids "every organ" of society to facilitate the realisation of human rights for all. As such, corporate responsibility to uphold human rights is an expected code of conduct recognised virtually in every voluntary and normative instrument related to corporate responsibility. Consequently, the endorsement of the Guiding Principles by the Human Rights Council further cements the place of corporate responsibility to respect in the international human rights regime.

At a minimum, the corporate duty to respect applies to all international human rights recognised in the International Bill of Rights and the ILO Declaration

on Fundamental Principles and Rights at Work. However, depending on the circumstances and nature of the business operations, a company may still need to consider additional international human rights standards. Regardless of size, nature, and location, the corporate responsibility to respect human rights applies to all corporations.[12]

The corporate responsibility to respect is divided into three main aspects: policy commitment, human rights due diligence, and remediation. First, companies should express their commitment to respecting human rights through a public policy statement. Such a statement should comprehensively cover the expectations of employees, business partners, and other parties directly participating in its operations, product line, and services. A policy statement showing the corporate responsibility to respect should also be incorporated into other corporate policies and business partners' codes of conduct.

Furthermore, the Guiding Principles enjoin companies to undertake ongoing human rights due diligence to identify, prevent, mitigate, and account for their human rights impact. Human rights due diligence refers to the constant process of identifying and addressing the human rights impact of a company across its operations, supplier, and business partner networks.[13] The primary objective of this process is to identify and mitigate the company's adverse effects on the human rights of employees, suppliers, and the local community. The human rights due diligence process should not only cover the internal processes of the company but also its external engagements with groups likely to be affected by its activities. In addition, the Guiding Principles charge companies to integrate their due diligence findings into company policies and allocate authority and resources accordingly.

Finally, through legitimate processes, the companies should provide for and cooperate in the remediation process where they identify to have caused or contributed to adverse human rights impacts. While judicial recourse is the most frequently traversed, other non-judicial mechanisms such as arbitration, mediation, and negotiation should also be considered. Alternative dispute resolution mechanisms have been significantly embraced in resolving such types of disputes due to the inadequacies in the court system.

Access to remedy

Additionally, the Guiding Principles elucidate that the duty to provide access to remedy lies on both the States and businesses. The states are urged to take appropriate steps to ensure that affected individuals can access effective redress through the court system or other administrative procedures. Where businesses have found that their activities caused or contributed to human rights infringement, they are expected to establish guidelines for remedial action within the corporation.

The role of the UN Working Group on Business and Human Rights

Over the years, the mood towards business and human rights has changed; the UN

[12]Daniel Augenstein and Chiara Macchi, 'The Role of Human Rights and Environmental Due Diligence Legislation in Protecting Women Migrant Workers in Global Food Supply Chains' (Tilburg University Research PortalMay 2021) <https://research.tilburguniversity.edu/en/publications/the-role-of-human-rights-and-environmental-due-diligence-legislat> accessed 10 May 2024.

[13]'Human Rights Translated : A Business Reference Guide' <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Human_Rights_Translated_web.pdf> accessed 10 May 2024.

Businesses are expected to avoid infringing on the human rights of individuals, including employees, customers, and communities affected by their operations. This includes ensuring fair labor practices, non-discrimination, and respecting the rights to health, safety, and privacy.

Guiding Principles have gained worldwide acceptance by states and stakeholders, even though they are a set of soft laws. As a result, these principles have significantly influenced domestic laws and policies.

The global acceptance and adoption of UNGPs can be attributed to the efforts of the UN Working Group on Business and Human Rights (UNWG).[14] The UNWG has been instrumental in the business and human rights projects. It developed a set of essential criteria on which effective National Action Plans on Business and Human Rights (NAP) are founded. First, the NAPs must be founded on the UNGPs.[15] NAPs need to reflect the "protect, respect, remedy" framework underpinned in the UNGPs to be fully effective in guiding domestic implementation. Secondly, NAPs need to be context-specific and accurately address the country's actual and potential corporate-related human rights abuses.[16] Governments should contemplate the most realistic and focused measures that are most efficient and impactful in protecting human rights and preventing business-related human rights violations. Moreover, NAPs should be developed transparently and inclusively. Governments should undertake nationwide consultations, and all relevant stakeholders should be allowed to participate in the

[14]Liliana Lizarazo-Rodriguez, 'The UNGPs on Business and Human Rights and the Greening of Human Rights Litigation: Fishing in Fragmented Waters?' (2021) 13 Sustainability 1 <https://ideas.repec.org/a/gam/jsusta/v13y2021i19p10516-d640598.html> accessed 10 May 2024.
[15]'Guidance on National Action Plans on Business and Human Rights, UN Working Group on Business and Human Rights' <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf>.
[16]Ibid

development and consequent update of the NAPs. Their views should be of paramount consideration.[17]

Lastly, it is imperative that the NAPs undergo regular review and updating to keep pace with the rapidly evolving business landscape. By continuously monitoring and evaluating them, Governments can ensure they effectively respond to the dynamic environment and adjust to the ever-changing context.

The UNWG also guides the NAP development process by enunciating a five-phase process that governments should follow. These phases include initiation, assessment, consultation, and drafting the initial NAP, implementation, and update. Phases 1 to 3 entail the development of the initial NAP, whereas Phases 4 and 5 entail the actual implementation of the NAP, continuous monitoring, and updating successive versions of the NAP. Additionally, the UN Working Group guides the NAP-making process and the content, substance, and structure of the NAP.

The Kenya National Action Plan on Business and Human Rights

In 2019, through the Office of The Attorney General and the Department of Justice, the Government of Kenya developed a National Action Plan on Business and Human Rights (now abbreviated as NAP). Interestingly, Kenya became the first country in Africa to develop a NAP on Business and Human Rights, joining an elite class now comprising 28 nations that have conclusively developed and updated their National Action Plans. This was a bold step for Kenya, keeping in mind that Kenya has witnessed a significant rise in foreign investment and, consequently, remarkable prosperity in the domestic private sector over the past few years.

While the growth of private industries favours sustainable development in Kenya, it also unfavourably impacts workers' fundamental rights and freedoms. The workers and the local community where these industries are established are also affected. Adverse effects resulting from business operations include but are not limited to unfavourable working conditions, active and historical environmental damage, child labour, loss of land, and subsequent eviction of members of the local community. Such worrying trends have led to relentless, egregious human rights violations propagated by unchecked business operations, whether by state-owned or private businesses.

Consequently, Kenya developed a NAP as a comprehensive strategy for protecting against nefarious human rights infringements by state-owned businesses or the private sector. It is noteworthy, however, that the NAP does not establish new obligations or new rights but simply rehashes those enshrined in the Constitution. The gist of the NAP is to address actual and potential business and human rights challenges faced by both the state and business.

The AG-led development process of the National Action Plan, also led by the Kenya National Commission on Human Rights, involved a stakeholder consultative process. An inter-agency National Steering Committee coordinated this process. Initially, the government flagged off a survey on human rights impacts related to business operations in Kenya.

In addition, the government also

[17] 'Guidance on National Action Plans on Business and Human Rights, UN Working Group on Business and Human Rights' <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf>.

commissioned a National Baseline Assessment carried out by the Kenya Human Rights Commission (KHRC) and the Institute of Human Rights and Business. This undertaking aimed to assess some of the country's vital legislation and regulations that guide business operations and conduct. Through such an assessment, the government could identify and critique the extent to which the legislation and regulations protect human rights, their enforcement, institutional framework, actual and potential gaps, and solutions. The National Baseline Assessment also examined the Government's commitment to implement its duty to promote respect for human rights and protect against human rights infringement by businesses through policies, laws, regulations, enforcement, and the provision of effective remedies for any violation.

The National Action Plan is founded on the UN Guiding Business and Human Rights Principles. It has isolated five thematic issues identified in the stakeholder consultative process: land and natural resources, labour rights, revenue transparency, environmental protection, and access to remedy. The NAP contextualises these thematic areas and underscores the policy concerns in those sectors. Having in mind these thematic areas, it is crucial to contemplate the objectives of the Kenya NAP, which include:

- To guide the State as it fulfills its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations[18]
- To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their activities[19]
- To offer a roadmap for strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in attaining SDG that respects human rights.[20]
- To form a basis for dialogue between the State, businesses, individuals, and communities whose rights are adversely impacted by business activities and civil society organisations on promoting respect for human rights by businesses.[21]

Challenges associated with corporate responsibility to respect human rights

The ensuing section will discuss the challenges that impede the State and businesses from fulfilling their duties and responsibilities to protect and respect human rights.[22] It is worth iterating that the UNGP, like a three-legged stool, is founded on a three-pronged approach: the protect-respect-remedy framework. It would be detrimental to human rights research if this paper covered only two aspects of that framework. Consequently, this paper will also investigate the factors that impede aggrieved persons from accessing remedies in cases of actual or potential human rights abuses.

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[18]Kariuki Muigua, 'Legal and Policy Framework on Meaningful Public Participation in Development' (*The lawyer.africa*26 April 2022) <https://thelawyer.africa/2022/04/26/framework-on-meaningful-public-participation-in-development/> accessed 10 May 2024.
[19]Ibid.
[20]Ibid.
[21]Ibid.
[22]Global Affairs Canada, 'Guidelines and Standards for Responsible Business Conduct' (GAC2021) <https://www.international.gc.ca/trade-commerce/rbc-cre/guidelines-lignes_directrices.aspx?lang=eng> accessed 10 May 2024.

Lack of a binding instrument

One underlying challenge that bedevils the domestication, implementation, and enforcement of the UNGP on Business and Human Rights is the need for a binding instrument, particularly at the international level. This results from the States' differing perspectives on business and human rights status and hesitance from non-state actors and transnational corporations. The debate surrounding business and human rights remains contentious in the global arena due to mistrust among developed nations. Thus, the absence of a binding instrument governing business and human rights or a treaty ratified by the states has led to general disinterest from the states in adopting National Action Plans on business and human rights in their respective countries.

Inadequate knowledge and awareness

Inadequate public awareness of business and human rights is another major challenge that bedevils implementing the NAP on Business and Human Rights. This affects both the state and businesses. Particularly in Kenya, there's a general confusion between corporate social responsibility (CSR) and UNGP on business and human rights; to an extent, CSR overshadows any conversation regarding corporate responsibility to protect human rights.

In addition, human rights due diligence is still alien in most states, especially the Global South. This, in turn, fosters a lack of awareness among businesses; thus, they are incapable of conducting human rights due diligence procedures in their operations. Due to insufficient knowledge in the public forum, even the public is inadequately aware of the corporate responsibility to respect their rights; more specifically, they are less informed on the corporate responsibility to conduct human rights due diligence on their operations. Consequently, they cannot effectively seek and access appropriate redress in cases of human rights infringements through adverse business practices. These malpractices are not limited to land alienation, child labour, unfavorable working conditions, sexual harassment, corruption, and environmental degradation.

Lack of a comprehensive legal framework

Also, a significant challenge arises from the need for a unified approach to business and human rights. In other words, despite the cementing of human rights in the Bill of Rights and their codification in relevant legislation that governs business operations, these instruments do not adequately protect Kenyans against human rights violations due to business operations. It is worth emphasising that the current legal framework that regulates business operations in Kenya needs to adapt to the protect-respect-remedy framework espoused in the UNGP on Business and Human Rights. Hence, the legal framework does not effectively compel the state to perform its obligation to protect human rights as enumerated in the Constitution and the UNGP on Business and Human Rights. Devastatingly, the Constitution and the relevant legislation do not adequately compel businesses to respect human rights and prevent potential abuses by conducting human rights due diligence.

Governance gap

Moreover, another fundamental challenge that adversely impacts the protection and respect of human rights is the governance gap that characterises business and human rights regimes. For instance, the legislature must enact legislation that meets international human rights and labour standards or enact inconsistent legislation. This ineffectiveness can be attributed to the need for more political will on the part of the state to meet its positive obligation to ensure the protection, respect, and

Overall, the responsibility of businesses for human rights is increasingly recognized as integral to sustainable development and corporate social responsibility. It involves not only compliance with laws and regulations but also proactive efforts to respect, protect, and fulfill human rights in all aspects of business operations and relationships.

fulfilment of human rights. This reluctance is evident in how the state handles, for instance, the protracted doctor's strike.

Recently, the Kenyan government has performed poorly in state protection against human rights infringements, thanks to the ongoing doctors' strike and the nation at large. Furthermore, this tensive situation is exacerbated by the ruthless manner in which these strikes are quelled, with extreme cases of police brutality being reported in some instances. As if that is not enough, the union officials and the medical fraternity are easy targets of online attacks and cyberbullying, as observed in the ambitiously antagonistic hashtags on our social platforms. It is through these social platforms that doctors are subjected to the brutal online onslaught and a bevy of insults. It is interesting to see whether the Kenyan government can maintain its bare-knuckle approach.

In light of these unfortunate incidences and many others, the government has not yet taken any decisive initiative to curb these active and potential human rights violations suffered by doctors and the medical fraternity at large. Instead, the Kenyan administration has assumed a hard stance against the medics, overtly antagonising what is otherwise their constitutional right to demonstrate and picket. Thus, in this regard, it can be concluded that the government of Kenya has performed dismally in its responsibility to protect against human rights abuses and to promote respect for fundamental freedoms and human rights by state organs and individuals. This sacred responsibility is not only enshrined in our transformative Bill of Rights but is also unequivocally reflected in the United Nations Guiding Principles on Business and Human Rights. This supposition partially forms the gravamen of this intellectual inquiry.

the complexity of global supply chains, diverse workforce demographics, and varying regulatory environments underscores the importance of human rights due diligence. Businesses in these sectors are increasingly expected to identify, prevent, mitigate, and account for their human rights impacts throughout their operations and supply chains

Weak enforcement

Likewise, another key challenge is the need for proper enforcement of laws that protect and promote the rights of workers and local communities affected by adverse business practices. The state and the enforcement agencies lack the resources to effectively punish human rights violations due to corporate actions and omissions. This challenge significantly affects the citizens' capacity to access justice in cases of actual or potential human rights abuses occasioned by harmful business practices, not limited to environmental pollution, child labour, slavery, unfavorable working conditions, discrimination, corruption, land alienation, and subsequent evictions. The weakness in the enforcement regime can undoubtedly be attributed to the need for more resources and funds to fully implement the dictates of the NAP on business and human rights.

Fragmented institutional framework

Additionally, the shortcomings in the state enforcement network can be attributed to the considerably fragmented institutional framework of the human rights regime. In other words, though closely related to their human rights responsibilities, the ministries and state departments are in perpetual conflict in their stand against corporate violations of fundamental freedoms and human rights. The responsible state departments have not, so far, showcased any visible synchronised effort toward protecting their citizens against human rights abuses by business operations. Hence, due to uncoordinated efforts to protect human rights and freedoms, there is discord in the enforcement regime. Thus, the Kenyan government is unable to effectively protect vulnerable Kenyans against actual and potential human rights violations perpetrated by the potentially unchecked private industrial sector. Lest we also forget the ever-menacing, unbootable lot that is the state parastatals, whose human rights infringements are commonly swept under the carpet thanks to the intricate, robust bureaucracy and undue administrative, procedural hurdles that are the very embodiment, character, and spirit of the Kenyan administration and public service delivery.

Business accountability challenges: Transparency and public awareness

Some challenges are specific to the business sector. Chief among them is the limited information on how the industries conduct human rights due diligence. Access to such vital information, or at least any campaign by a "meddlesome interloper" inquiring in that direction, is often met with no response, spirited denial, or intimidation, even in extreme cases, organised harassment, physical assault, kidnapping, torture, and even the assassination of human rights defenders. This has been the case mainly in Asia and South America.

In most cases, especially in developed nations, particularly in Kenya, the public is remotely aware, or completely unaware, of

the corporations' obligation to respect their human rights and fundamental freedoms. At this point, it is worth noting that the corporate responsibility to respect human rights envisaged in the UNGP entails much more than the conventional and widely recognised CSR principles and methods. In other words, while considerably similar to the Business and Human Rights (BHR) approach, the CSR approach has some variations. It is perhaps less sustainable and less equitable than the latter approach.

To begin with, most CSR projects are conducted voluntarily and less regularly; more often than not, these projects are usually not sustainable. In addition, companies are notorious for masking non-compliance with community work and CSR projects. Unsurprisingly, business entities must be more inclusive while mapping their obligations to comply with due diligence requirements, as elucidated in the UNGP on Business and Human Rights. It is undebatable that there needs to be more public awareness about human rights related to business activities, thus effectively hindering access to redress in cases of injuries due to adverse business operations.

Possible solutions

In light of the preceding section, it is beyond doubt that businesses significantly impact the socio-economic status of their adjacent community and the human rights of the workers and the local community. Additionally, it cannot be denied that, despite Kenya being the first African state to develop a NAP on Business and Human Rights, there's still a lot to be done regarding its full implementation. However, all hope is not lost. Kenya can still reignite its commitment to the UNGP on Business and Human Rights and improve its performance in promoting, protecting, and respecting human rights and fundamental freedoms. Similarly, the Kenyan government can still improve its citizens' access to redress for human rights violations resulting from adverse business activities.

Buffering enforcement agencies

To begin with, the government should step up its efforts to enforce corporate responsibility to respect human rights, in line with UN Guiding Principle 1. The government should first increase its financial commitment to implementing the NAP on Business and Human Rights. Adequate funds should be allocated to the relevant enforcement agencies to be best equipped to enforce the provisions of the Bill of Rights and the UNGPs. It is worth recognising that many big businesses and companies in the country have huge impacts on the lives of Kenyans. Therefore, the relevant enforcement agencies should be resourceful and financially stable to fulfill their mandate smoothly.

A unified multi-sectoral approach

In addition, the government should also synchronise its efforts to implement its human rights obligations underlined in the Bill of Rights and the UNGPs. In other words, the relevant ministries and state departments should coordinate their efforts to effectively discharge their mandate to protect Kenyans against human rights abuses by business activities in all economic sectors. These sectors include but are not limited to agriculture, mining, tourism, manufacturing, immigration, land, the environment, and the corporate sector. Government agencies and state departments should cooperate and coordinate their efforts to enforce corporate responsibility in their respective industries. A fragmented approach toward discharging state obligations to protect human rights is less practical than a coordinated effort.

Improving awareness

Even more importantly, there is a need to create and improve awareness about the

Prof. John Ruggie

adoption, context, and provisions of the UNGPs on Business and Human Rights. It is vital to create awareness about Kenya's commitments to the UNGPs as outlined in its National Action Plan. Such an arduous endeavour can only be realised through social media campaigns. In recent years, social media has proven efficient in advancing pressing issues, thanks to the astronomical increase in people accessing the internet. Furthermore, even government agencies have adapted social media pages as channels to reach the public. Thus, through social media, the government can educate the masses, especially the youth, on the UNGPs and their relevance to our constitutional dispensation. Social media campaigns should also complement mainstream media, such as television, newspapers, and radio broadcasting, which are more popular with the older generation. In addition, it is advisable that businesses also conduct regular seminars and training on human rights related to business activities, particularly on human rights due diligence (HRDD), its importance, and how it is conducted. In this way, both the employees and the public are, at least, aware of their rights concerning daily business operations through BHR-nuanced seminars and training. Generally, creating awareness on business premises and in public forums is to change the business community's perception of business and related adverse human rights impacts. As such, it is paramount that the State, the business fraternity, academia, and other non-state actors collaborate in conducting a nuanced training of the BHR principles, as founded by Prof. John Ruggie and immortalised in the UN Guiding Principles on Business and Human Rights.

Access to redress

Concerning access to justice, there are already a lot of schools of thought towards that intellectual inquiry. Chief among them, currently, are the appropriate dispute resolution mechanisms, also known as the alternative dispute resolution mechanisms. In today's fast-paced business world,

ADR has firmly established itself as a preferred method for resolving commercial disputes, allowing parties to reach mutually beneficial agreements outside the courtroom.

Recently, Chief Justice H.E. Martha Koome reported, in a speech by Deputy Chief Justice H.E. Philomena Mwilu, that Court Annexed Mediation (CAM) achieved an impressive case resolution rate of 92.3%. Additionally, approximately Ksh. 52.1 billion has been released back into the Kenyan economy thanks to the expeditious settlement of disputes through CAM.[23] Most of these cases entail commercial disputes. CJ Koome had this to say about the viability of mediation as an appropriate dispute resolution mechanism:

> "*In a world where industrial disputes can arise as swiftly as the winds change, mediation stands as a beacon of hope—a tool that can transform conflict into consensus and adversity into opportunity.*"[24]

Such remarkable results indicate that mediation is an effective method of dispute resolution, especially in the business environment. Therefore, the gains of mediation cannot be gainsaid.

International courts have made commendable strides in resolving industrial-related disputes involving States, transnational corporations, and lobby groups. Recently, the European Court of Human Rights acknowledged in its landmark case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[25] that states have a positive obligation to combat the impacts of climate change to protect the right to a clean and healthy environment; failure to fulfill this responsibility amounts to a violation of the fundamental right to a clean and healthy environment. This judgment is a testament to the role of international courts in ensuring the state's obligation to protect human rights and fundamental freedoms.

Conclusion

As established earlier, the concept of BHR is much broader than the more conventionally recognised principles of CSR. This paper, nevertheless, jettisons the notion that the BHR movement is superior to the widely recognised CSR principles; these two schools of thought are similar in many aspects. What the BHR principle does, this article submits, is that it bolsters the protection and respect of human rights and fundamental freedoms related to business activities. Moreover, the BHR framework, through the UNGPs, provides access to recourse in case of human rights violations as a result of adverse business activities.

To summarise, businesses must understand that humanising their operations is not only a moral imperative but a strategic necessity for achieving sustainable success in the modern world. By embracing the core tenets of Business and Human Rights and proactive enforcement of measures to uphold and champion human rights, firms have the potential to contribute to the creation of a more equitable, harmonious, and enduring global environment that benefits all individuals.

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Political will as the key to the success of equalisation fund

By Abuya John

Introduction

The belief in human equality is an idea that is basic to the modern doctrine of individualism, with equal respect for the human dignity of all people being essential to the realisation of individual autonomy, the protection of privacy, and the opportunity for self-development.[1] Ellen Gould White, a Christian author commenting on equality among the parties to a marriage said that God provided a helper corresponding to Adam and who could be one with him in love and sympathy. Eve was created from a rib taken from the side of Adam, signifying that she was not to control him as the head, nor to be trampled under his feet as an inferior, but to stand by his side as an equal, to be loved and protected by him.[2] Equality is thus integral to the society and has to be constitutionalised.

Prior to the 2010 Constitution, the government was centralised thus perpetuating marginalisation of some parts of the country from full participation in social, economic and political activities which caused disparities in economic development among different regions and communities. Marginalisation infringed on the right of every individual to be treated equally thus it had to be remedied. Article 27 of the Constitution enshrines the right to equality and freedom from discrimination and establishes the Kenya National Human Rights and Equality Commission under Article 59 to protect the right to equality.

Ellen Gould White

Article 27 (6) of the Constitution states that to give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other

[1]Michel Rosenfeld; Affirmative Action, Justice and Equalities: "A Philosophical and Constitutional Appraisal" Ohio State Law Journal, Volume 46, 1979.
[2]Ellen Gould White, Letters to Young Lovers, page 11.2.

Michel Rosenfeld

measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Affirmative action programs are thus well designed to redress past wrongs committed to individuals.

Affirmative action programs

Michel Rosenfeld[3] states that the constitutionality of an affirmative action program should depend on six factors which include; 1) a class of individuals who, through state action, have been deprived of equality of opportunity on the basis of a morally irrelevant characteristic shared by all the members of the class; 2) adverse present effects traceable to such past deprivation; 3) the class, taken as a whole, is substantially disadvantaged in the competition for the scarce good that is the subject matter of the affirmative action program-evidence of substantially lower prospects of success for members of the disadvantaged class than for the rest of the population, constituting proof of such disadvantage; 4) the affirmative action program is reasonably calculated to equalise the prospects of the members of the disadvantaged class with those of the members of the general population, and this equalization of prospects is reasonably likely to bring about an equalization of means; 5) no alternative remedy, not relying on preferential treatment, is likely to bring about equalization of prospects within the same time frame as would the affirmative action program; and 6) the burden on an innocent member of any group not singled out for preference is limited to a decrease in the prospects of obtaining the good subject to the affirmative action plan or an increase in the prospects of losing that good, in the event of adverse economic conditions causing that good to become more scarce.

Equalisation fund

Article 204 of the Constitution establishes the equalisation fund as one of the affirmative action programs intended to solve the problem of marginalisation which shall be paid one half per cent of all the revenue collected by the national government each year calculated based on the most recent audited accounts of revenue received, as approved by the National Assembly. The national government shall use the equalisation fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.[4]

[3]Michel Rosenfeld; Affirmative Action, Justice and Equalities: "A Philosophical and Constitutional Appraisal" Ohio State Law Journal, Volume 46, 1979.
[4]Article 204 (2) of the Constitution of Kenya, 2010.

The Christian story of the Israelites[5] who wandered for forty years in the wilderness clearly reveals how the equalisation fund was to be shared. The Israelites were provided with bread from heaven and everyone was commanded to gather as much as they needed for a day as it would rain from heaven daily. The Israelites did as they were told; some gathered much, some little. And when they measured it by the Omer, the one who gathered much did not have too much, and the one who gathered little did not have too little. Everyone had gathered just as much as they needed. The counties would receive varied shares of the equalisation fund but the county which would receive more would not have too much and the county which received less would not have had too little.

One of the principles of public finance is that the public finance system shall promote an equitable society, and in particular, the expenditure shall promote the equitable development of the country, including by making special provisions for marginalised groups and areas.[6] The equitable sharing of national revenue established under Article 202 also takes into account the economic disparities within and among counties and the need to remedy them and the need for affirmative action in respect of disadvantaged areas and groups.[7] The equalisation fund is one of the affirmative steps in ensuring the marginalised areas in Kenya are not left behind in terms of economic development.

No matter how good affirmative action programs are, without good political will, all attempts to their implementation shall be in vain. A deep analysis of political will clearly reveals how important it is to the effective implementation of the equalisation fund.

Political will

Political will is the extent of committed support among key decision-makers for a particular policy solution to a particular problem.[8] This develops a pragmatic definition of political will with the following key elements: A sufficient set of decision-makers; with a common understanding of a particular problem on the formal agenda; committed to supporting; A commonly perceived, potentially effective policy solution.[9] Good political will is a critical element for good governance which ensures the success of policy solutions. When all the essential elements of political will are met, positive results ensue in the implementation of good policies and development. A clear analysis of the various elements of political will shows how crucial political will is to ensuring the effective implementation of the equalisation fund.

a.) A sufficient set of decision-makers

Expound on the veto players theory advocated by Tsebelis George on how political institutions work.[10] Veto players theory proposes that a crucial element in understanding policy change is determining the players whose agreement or indifference is necessary to change the status quo policy position.[11] The question then is who are the key veto players in ensuring the effective implementation of the equalisation fund? Article 204 (3) of the Constitution provides that the national government may use the equalisation fund only to the

[5]The Bible, Exodus 16:16-18.
[6]Article 201 (b) (iii) of the Constitution of Kenya 2010.
[7]Article 203 of the Constitution of Kenya 2010.
[8]Lori Ann Post, Amber N. W. Raile, Erick D. Raile; Defining Political Will, Politics & Policy, Volume 38, No. 4 of 2010.
[9]Lori Ann Post, Amber N. W. Raile, Erick D. Raile; Defining Political Will, Politics & Policy, Volume 38, No. 4 of 2010.
[10]Tsebelis George, Veto Players: "How Political Institutions Work", Princeton University Press 2002.
[11]Lori Ann Post, Amber N. W. Raile, Erick D. Raile; Defining Political Will, Politics & Policy, Volume 38, No. 4 of 2010.

extent that the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and either directly, or indirectly through conditional grants to counties in which marginalised communities exist. Article 204 (4) continues to provide that the Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalisation Fund.

The veto players highlighted in the Constitution include the National government, County governments, the Parliament and the Commission on Revenue Allocation. Other key veto players include the National Treasury and the Controller of Budget as established under section 18 of the Public Finance Management Act.

b.) A common understanding of a particular problem on the formal agenda

The veto players must have a common understanding of the problem that the policy seeks to address to ensure combined effort towards achieving the object of the law or policy. Article 204 (2) of the Constitution provides that the national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible. The Constitution identifies the problem of inequality as with regards to the access of essential services like water, health, roads and electricity in the marginalised areas thus providing for the equalisation fund which is aimed towards remedying the problem.

In the case of Council of County Governors v Attorney General & 2 others,[12] The court highlighted the Report on Devolution of Power: A Special Working Document for the National Constitutional Conference that was prepared by the Constitution of Kenya Review Commission (CKRC) on 19th August 2003, at Page 107 as follows: "As already pointed out, equalisation is necessitated by both vertical and horizontal imbalances. At the vertical level, imbalances in the allocation of functions and revenues may create a need for equalisation. The national level of government may have a higher taxing power yet have lesser functions as compared to the sub-national levels of government. At the horizontal level, different sub-national units may have different fiscal capacities for delivering public services to their residents".

The court also noted that the purpose of equalisation fund is to correct any imbalance in the revenues of sub-national levels of government, and its effect is the revenue sharing between national and devolved governments and will have thus definitely have an impact on fiscal devolution. The court acknowledged the Commission on Revenue Allocation Policy on the Criteria for Identification of Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014 which provides that "the overarching objective of this policy is to improve the welfare of communities in marginalised areas. This would bring the quality of basic services such as roads, health care, water, and electricity in marginalised areas to the level generally enjoyed by the rest of Kenya. The provision of these basic infrastructure and services could be addressed through a number of policy instruments such as an equalisation fund, conditional grants equity-promoting

[12]Council of County Governors v Attorney General & 2 others; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR

Revenue allocation is a fundamental aspect of financial management in organizations, governments, and nonprofits alike, aiming to optimize resource utilization and achieve strategic objectives while adhering to principles of fairness and accountability

legislative and administrative actions. The instrument used in this policy is the Equalisation Fund, which will run for 30 years as stipulated in Article 204(6) of the Constitution."

The common understanding of this problem will ensure the effective implementation of the equalisation fund.

c.) Committed to supporting

It is not enough to identify the veto players with a common understanding of the problem, they must be committed to supporting the laws and policies addressing the problem. The case of Council of Governors v Attorney General and 2 others of 2019[13] revealed the lack of committed support between the veto players key to the implementation of the equalisation fund.

Brief facts

The Commission on Revenue Allocation made recommendations on the appropriation and management of the fund where it would be appropriated in a single budget line for each financial year; that it be given indirectly as conditional grants to marginalized counties and, that actual expenditure be done when the county governments were in place. It was further recommended that unspent funds earmarked for a specific project in each year be rolled over to ensure project completion. On the management of the Fund, it recommended the creation of an Advisory

[13]Council of County Governors v Attorney General & 2 others; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR

Committee that would develop operational guidelines including its membership. The policy was approved by Parliament in December 2014, and was to be effective for three financial years from the date of approval.

The cabinet secretary for finance issued guidelines on the administration of equalisation fund which did not take into consideration the recommendations of the Commission on Revenue Allocation. The council of governors challenged the legality of the guidelines before the High Court in Nairobi.

Issues

i.) Whether the policy recommendations by the Commission on Revenue Allocation on Revenue Allocation, utilisation and management of the Equalisation Fund are binding on the National Treasury.

The court determined that the recommendations of the Commission on Revenue Allocation were binding and had to be considered by the National Treasury. The court stated that the failure by the National Treasury and by extension, the cabinet secretary for finance, to include representatives from the affected counties in the composition of the equalisation fund board as recommended by the commission on revenue allocation violates the letter and spirit of the Constitution. Article 159 (1) obligates this court while exercising its judicial authority, to protect and promote the purpose and principles of the Constitution, including devolution and protection of the marginalised. Without this, the essence of the commission on revenue allocation would be rendered superfluous.
It relied on the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others[14] where the court stated that "I am fortified in my finding that the advice given by SRC is binding because a constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in the constitution must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in company of other binding provisions. A Constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain Articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in the Constitution, Article 259 (11) removes all discretionary power and by so doing, the Constitution contains binding provisions".

ii.) Whether the Guidelines on the Administration of the Equalisation Fund issued by the National Treasury vide Legal Notice No. 1711 of 13th March 2015 are unconstitutional.

The court held that the guidelines were unconstitutional because the effect of implementing them violated the principles of the constitution and the purpose of the equalisation fund. It held that "the role of the national Government under Article 204 of the Constitution as read with Section 18 of the PFMA is limited to the operational aspects of establishment and maintenance of an account for the equalisation fund, including the preparation, allocation and execution of budgetary decisions with regard to that account, using established financial procedures. These provisions do not give the national government any powers in relation to the decisions and

[14]Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others, [2015] eKLR

manner of expenditure of the monies in that account. Under Articles 204 and 216 these functions are the preserve of the Commission on Revenue Allocation, to be approved by Parliament.

The court grounded its decision on the importance of devolution in the effective implementation of the equalisation fund. The judge highlighted that "It is therefore evident that one of the key objectives of devolution is to implement the principle of subsidiarity, which requires the allocation of functions and accompanying resources to the lowest competent authority or unit of governance". The reason behind this is that such units are better placed to identify their needs and priorities in terms of democratic governance and development. Other principles that are crosscutting within these objects are: good governance, public participation, equity, transparency, accountability and sustainable development, which are also founding values in the Constitution." This was in objection to the provision of the guidelines issued by the cabinet secretary for finance which provided that the funds were to be managed by the national government.

Finally, the court noted that "It must be appreciated that the basic services for which the equalisation fund is to be used under Article 204(2) of the Constitution such as water, roads, health facilities and electricity at the local level, are county government functions under Part 2 of the Fourth Schedule to the Constitution. For that reason, they can only be implemented by the County Governments. That being the case, implementation of the projects supported by the equalisation fund through line ministries of the National Government as alleged by the Respondents to have happened and as provided in the impugned Guidelines, has no legal basis as the national Government has no such functions under the Fourth Schedule. It is patently unconstitutional." In one of the court orders, it was ordered that the Cabinet secretary for finance

The primary goal of an equalisation fund is to promote equity by redistributing financial resources from economically advantaged regions to disadvantaged ones, thereby ensuring that all citizens have access to a similar level of public services and opportunities regardless of their geographic location.

should prepare an appropriate policy and/or statutory instruments on the administration of the Equalisation Fund that is compliant with the recommendations made by the Commission on Revenue Allocation as approved by Parliament, and the objectives of the equalisation fund and devolution. This emphasises the importance of the third element of political will as the committed support towards the laws and policies to ensure effective implementation of equalisation fund.

d.) A commonly perceived, potentially effective policy solution

Article 204 of the Constitution establishing the equalisation fund offers the solution to the marginalisation in Kenya that had deprived many Kenyans of essential services like healthcare. The Commission on Revenue Allocation established under Article 215 of the Constitution is mandated to determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas for purposes of Article 204 (2). The primary criteria to establish the marginalised areas was the County Development Index which is constructed from indicators measuring the state of health, education, infrastructure and poverty in a county; the insights on

the marginalisation from the Commission's County survey; and, analysis of historical and legislated injustices. Based on the above criteria, the Commission gazetted fourteen counties, Turkana, Mandera, Wajir, Marsabit, Lamu, Kwale, West Pokot, Isiolo, Samburu, Tana River, Narok, Garissa, Taita Taveta and Kilifi being the beneficiaries of the equalisation fund.[15]

The Commission developed a policy for 2014-2017, identifying the fourteen counties and providing the framework to guide in the planning, implementation, monitoring and evaluation of the Equalisation fund.[16] In April 2016, the National Treasury published the 2016/2017 estimates of revenue and expenditure of the Equalisation Fund for the year ending 30th June 2017. The document stated that the total entitlement of the equalisation fund for the financial years 2011/2012 to 2016/2017 was estimated at Ksh20,080,759 and the proposed allocation for the FY 2016/17 was Kshs 6 billion, which together with the KSh6.4 billion (reflected as balance brought forward from previous year allocation), brings the total amount available for projects across the 14 counties to Kshs12.4 billion. Out of this, the Board's recurrent grant towards administrative services and operational activities are estimated at Ksh 598.82 million while the remaining Ksh 11.8 billion is for the development's projects.[17]

A second policy had also been developed which provided for 1424 marginalised areas across 34 counties which are to benefit from the equalisation fund.[18] These are evidence of commonly perceived potentially effective policy solutions that are critical to good political will that ensure effective governance.

Conclusion

Article 204 (6) of the Constitution provides that this provision lapses twenty years after the effective date, subject to clause (7) which states that the Parliament may enact legislation suspending the effect of clause (6) for a further fixed period of years, subject to clause (8). Clause (8) states that Legislation under clause (7) shall be supported by more than half of all the members of the National Assembly, and more than half of all the county delegations in the Senate. This provides that the equalisation fund is to serve its purpose within twenty years since August 2010.

However, since the fund was rationalized in 2023, there is a need of extending the period to ensure the quality of basic services including water, roads, health facilities and electricity in the marginalised areas are brought to the level enjoyed by the rest of the nation. As noted by the Senate Finance and Budget Committee, the extension of the sunset clause will be a good incentive to ensure the full realisation of the purposes of the equalisation fund.

However, good political will is more crucial as it ensures early disbursement of funds and investment in good developmental projects in the marginalised areas.

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[15]Commission on Revenue Allocation Policy 2013.
[16]Commission on Revenue Allocation Policy 2013.
[17]Jarso Guyo Mokku; Discussion Brief: Marginalized Communities Losing an Opportunity: Urgent Need for Improvement and Efficiency of the Equalization Fund, 2017.
[18]Commission on Revenue Allocation: A Second Policy and Criteria for Sharing Revenue among Marginalized areas, 2018.

Analysis of impacts of floods on persons with disabilities in Kenya

By Hosea Katila

Abstract

Rains play a pivotal role in the economy of countries that are dependent on rainfed Agriculture like Kenya. However, when the rain leads to flooding, it diverts this significance to disaster. It has become inevitable for floods to hit a country and leave it as it was before. Associated effects of floods among others include destruction of properties; displacement of people and deaths. Whereas everyone is usually affected in one way or the other, there are those who are harshly affected. These are the poor, mostly living in slums; those living along river banks and the ones living in swampy areas. Among the groups highly affected are persons with disabilities. The environmental justice studies have not also focused on the persons with disabilities. This paper legally examines the effects on the persons with disabilities; looks into existing frameworks for the same and recommends policy reforms to ensure such persons are accorded their rights as envisaged in legal instruments.

1.0. Introduction

Socially vulnerable populations are disproportionately impacted by flood events including home inundation, evacuation

Persons with disabilities (PWDs) represent a diverse group with varying types and degrees of impairments, including physical, sensory, intellectual, and mental health disabilities. Addressing their needs and ensuring their full inclusion and participation in society are essential aspects of human rights, social justice, and development.

and displacement. Viewed from a social vulnerability perspective, flood events intersect with social, cultural, economic and other factors (such as age, gender, poverty and disability) to shape people's exposure to risk and their ability to prepare for, respond to and recover from extreme events.[1] While climate change is a global phenomenon, the impacts are more or less specific to local areas such as observed in the Kenyan case.[2] The majority of people in Kenya are poor. The reliance of the majority of the population on rain-fed agriculture and livestock production

[1]Bailie J, Matthews V, Bailie R, et al Exposure to risk and experiences of river flooding for people with disability and carers in rural Australia: a cross-sectional survey BMJ Open 2022;12:e056210. doi: 10.1136/bmjopen-2021-056210
[2]Mwendwa, P. and Giliba, R.A., 2012. Climate change impacts and adaptation strategies in Kenya. *Chinese Journal of Population Resources and Environment*, 10(4), pp.22-29.

Physical, communication, and information barriers limit access to buildings, transportation, information, and communication technologies (ICTs), thereby restricting participation in society.

puts them in a vulnerable position first because of the negative impacts that adverse weather conditions like floods have on their production systems and also due to fluctuating market prices for their produce, both locally and internationally. Climatic fluctuations have significant impacts on Kenyan society, via food security, agriculture, water, health, natural disasters and the environment. For instance, extreme floods in the country are often associated with very severe socio-economic impacts that include lack of food, water, energy, and many other basic needs including destruction of infrastructure as well as loss of lives. Such impacts have tended to retard socio-economic growth of the country with the ultimate enhancement of poverty.[3] People with disability are disproportionately impacted by floods[4] which provokes the numerous calls for more disability-inclusive responses to weather-related events. Most evacuation plans presuppose the ability of individuals to run, walk, climb, and use alternate forms of egress to escape from the built environment.[5] This paper looks at the impacts of national floods on persons with disabilities, the effectiveness of the existing legal framework and relevant recommendations.

2.0. Impacts of national floods on persons with disabilities

Physical health issues

A range of internal or individual factors was revealed in studies include health conditions as barriers. Physical impairments and poor health conditions restricted

[3]Marigi, S.N. (2017) Climate Change Vulnerability and Impacts Analysis in Kenya. American Journal of Cli- mate Change, 6, 5274 https://doi.org/10.4236/ajcc.2017.61004

[4]Chakraborty, J., Grineski, S.E. and Collins, T.W., 2019. Hurricane Harvey and people with disabilities: Disproportionate exposure to flooding in Houston, Texas. *Social Science & Medicine*, 226, pp.176-181.

[5]Laura M. Stough, The Effects of Disaster on the Mental Health of Individuals with Disabilities

disabled persons from engaging in income-earning activities (cutting grass to feed cows, herding cows, ploughing a field, working as builders, and so on) and retrofitting their houses or moving heavy items by themselves before storms or floods.[6]

Mental health impacts

Mental health concerns specifically impact people's ability to navigate the systems needed to aid recovery. People with disability take longer to recover from weather-related disasters, and require longer-term tailored support during that period.[7] Persons with mental disabilities in Kenya also stay in the streets and areas susceptible to the effects of floods. Furthermore, the impact on the dignity of these people would skyrocket the effects. The CRPD recognises dignity to be accorded to persons with disabilities.[8]

Discrimination in distribution of relief aid

Discrimination in relief activities such as food distribution or medical services and recovery efforts also places persons with disabilities in increased vulnerable situations in the aftermath of disasters,[9] stigma, prejudice, and discrimination from the public or even within the family of persons with disabilities were found to be significant external barriers to the achievement of capabilities that PWD value. This disability-related stigma often leads to discriminatory actions or denial of basic rights and services to PWD. In turn, discrimination and exclusion tend to be exacerbated in times of disasters when resources are often destroyed and become scarce.[10]

Accessibility

As many people had to relocate, accessing information became even more of a challenge. Disability support staff and services themselves were compromised and disrupted by the flood event which further exacerbated problems with prompt access to recovery and support services. People with disability experience difficulties obtaining housing that is accessible in both the short and long term.[11] Most roads within Nairobi were flooded which forced some road users to use boats for movement. This coupled with the fact that houses were flooded inside posed a huge risk to persons with disabilities living within those areas.

Barriers to evacuation

The time needed by a person using a wheelchair (and supported by an assistant) to reach an evacuation point is double the time needed by a person without disabilities. This indicates the critical role of environmental conditions, such as accessibility and inclusive evacuation plans, in enabling PWD to secure their safety in times of disaster.[12] Issues that affect persons with disabilities include inaccessible, conflicting and confusing information and poorly timed or incorrect warnings regarding flood-water levels and the possible need for evacuation.[13]

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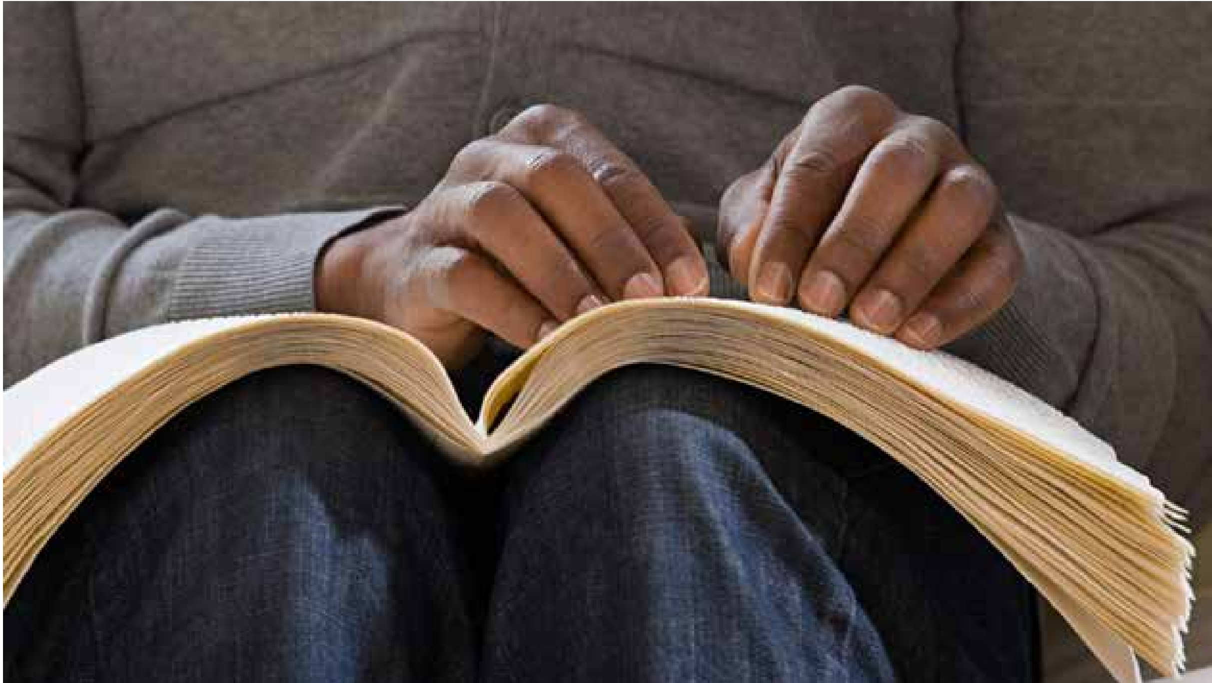
[6]Ibid
[7]Bailie, J., Matthews, V., Bailie, R., Villeneuve, M. and Longman, J., 2022. Exposure to risk and experiences of river flooding for people with disability and carers in rural Australia: a cross-sectional survey. *BMJ open*, *12*(8), p.e056210.
[8]The Convention on Rights of Persons with Disabilities
[9]Wisner, B. 2002. Disability and disaster: Victimhood and agency in earthquake risk reduction. *In Earthquakes*, ed. C. Rodrigue, and E. Rovai. London: Routledge.
[10]Binh, T.T., V.H. Phong, and V.P. Thao. 2017. *Ending stigma—Assessment from the perspectives of people with disabilities.* Hanoi: Knowledge Publishing House.
[11]Ibid
[12]Robinson, A. 2017. *Disability inclusion and disaster risk: Principles and guidance for implementing the Sendai framework.* https://resourcecentre.savethechildren.net/node/13261/pdf/nett_uu_internasjonal-rapport_2017.pdf.(Accessed 2 May,2024)
[13]Ibid



Providing inclusive education and vocational training equips Persons with disabilities with skills necessary for employment and independence.

3.0. Framework for protection of persons with disabilities during floods

3.1. International legal and institutional framework

3.1.1. *The Convention on the Rights of Persons with Disability (CRPD)*

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The UN Convention on the Rights of Persons with Disabilities (CRPD), requires that persons with disabilities benefit from and participate in disaster relief, emergency response and disaster risk reduction strategies. States Parties are required to take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.[14] It is part of the laws of Kenya by dint of Article 2(6).[15] The CRPD also provides for the right to human dignity as 'dignity and respect of bodily integrity and autonomy' of persons with disabilities. Persons with mental disabilities are entitled to human dignity and respect when seeking or being offered medical treatment and any other treatment, in the same fashion as is accorded to persons without disabilities.[16] In the case of *Purohit & Another v The Gambia* the African Commission held: "Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled without discrimination".

[14]The Convention on the Rights of Persons With Disabilities, Article 11
[15]Constitution of Kenya (2010), Article 2(6)
[16]The Convention on the Rights of Persons with Disabilities, Article 25

3.1.2. Universal Declaration of Human Rights

It provides for the equality of everyone by virtue of being human and that no one should be discriminated against on any of the grounds.[17]

3.2. Regional framework

3.2.1 African Charter on Human and Peoples Rights

It entitles everyone to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.[18]

3.3. National framework

3.3.1 The Constitution of Kenya, 2010

The Constitution brings into law international conventions and treaties through ratification.[19] It obligates state organs and public officers to address the needs of vulnerable persons within society, including those with disabilities. It guarantees equal protection and equal benefit of the law and prohibits discrimination on the basis of disability.[20] It also provides persons with disabilities with specific entitlements, including barrier-free access–what it refers to as ". . . reasonable access to all places, public transport and information".[21] The Constitution further establishes the environment and land court that presides over matters relating to the land and environment including matters climate change.

3.3.2 Persons with Disabilities Act

Persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.[22]

4.0. Effectiveness of protecting persons with disabilities during disasters in Kenya

The achievement of a robust mechanism for protecting the rights of persons with Disabilities in Kenya has been put to a halt by a myriad of challenges. These challenges include:

a). Inadequate policy, legal and institutional frameworks

The disaster response activities in Kenya over the years have been poorly coordinated, due to a lack of standard operational procedures and Disaster Emergency Operation Plans. There is also limited legal and institutional framework to give an inclusive response to persons with disabilities. In the absence of planned and coordinated action, prevention, preparedness and mitigation have not always been attained.[23] The Persons with Disabilities Act[24] being the major

[14]The Convention on the Rights of Persons With Disabilities, Article 11
[15]Constitution of Kenya (2010), Article 2(6)
[16]The Convention on the Rights of Persons with Disabilities, Article 25
[17]Universal Declaration of Human Rights, Article 7
[18]African Charter on Human and Peoples Rights, Article 2
[19]Ibid
[20]Ibid, Article 27
[21]Ibid, Article 54
[22]Persons with Disabilities Act, Section 21
[23]National policy on Disaster Management in Kenya,2009
[24]Persons with Disabilities Act, 2003

effective disaster management requires a comprehensive approach that integrates risk assessment, preparedness, response, recovery, and mitigation strategies. It involves collaboration among governments, organizations, communities, and individuals to build resilience and minimize the impact of disasters on lives and livelihoods.

Act of Parliament, fails to provide for an explicit measure through which persons with Disabilities can be protected during disasters. The same Act was enacted long time ago before entering into force of the CRPD[25] as well as before the 2010 Constitution which then means that a number of provisions have been left out.

b). Inadequate finances, human resources and equipment

The participating institutions charged with handling disasters in the country are faced with inadequate budgetary allocation and conditional donor support; such that the amount of money made available for Disaster Management is far less than the realistic amount actually needed to manage successfully. Furthermore, the lack of adequately trained human resources in Disaster Management with respect to persons with disabilities exacerbates the problem. Poor resource management and inadequate coordination of finances, human resources and equipment have also weakened disaster interventions.[26]

c) Weak disaster management capabilities within communities and institutions

The Kenyan community has not been sufficiently sensitised on disaster management and this means the persons with disabilities too have nothing

[25]Conventions on the Rights of Persons with Disabilities.
[26]Ibid

to learn as well as nowhere to get assistance. This lack of preparedness and coping mechanisms thereby, increasing dependency syndrome and thus increasing vulnerabilities and potential impacts on the victims. More recently, there have been new challenges in the management of disaster cycles, especially in the process of relief, repatriation, rehabilitation and resettlement geared towards recovery of Internally Displaced Persons (IDPs).[27] Individuals with disabilities are at risk for many of these factors, potentially making them one of the groups most vulnerable to the economic and psychological effects of a disaster. Individuals with disabilities and their families are disproportionately poor and thus more likely to live in areas where housing and rental properties are less expensive, such as flood-prone areas. In addition, disasters can cause disabilities through injury, conflict, or the disruption of health-care services following a disaster (International Federation of Red Cross and Red Crescent Societies)

d). Poor governance and lack of political will

The lack of political will has slowed down the process of putting in place an effective Disaster Management system. This has hindered the formulation and implementation of disaster related policies and legal framework.[28] In response to the floods in Kenya in 2024, the government ordered residents in "high-risk fragile ecosystem areas" to vacate immediately, promising to evacuate, relocate, and protect exposed communities. However, this directive led to forced and arbitrary evictions, particularly targeting impoverished neighbourhoods such as Mukuru Kwa Reuben and Kiamaiko in Nairobi. These areas, characterised by less solid structures and poor sanitation, were bulldozed without sufficient notice or proper consultation, leaving thousands homeless.[29] This was also done in total disregard of persons with disabilities living in those areas.

e) Weak enforcement mechanisms

Kenya is a state party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which provides for the promotion, protection and full and equal enjoyment of all human rights by persons with disabilities.[30] The CRPD requires Kenya to '…ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind based on disability. The Constitution of Kenya acknowledges this. However, Kenya faces a challenge in implementing the laws starting from the enactment of appropriate legislation to formulation of policies that would see these laws implemented.

5.0. Policy recommendations

Legal and policy reforms should be put in place as a response to help persons with disabilities respond to disasters such as floods. The starting point for this should be the enactment of the Persons with Disability Bill, 2023 which will meet the current needs of persons with disabilities as well as be in harmony with other laws. Furthermore, the government needs to allocate more funding for disasters and ensure response-specific mechanisms for persons with disabilities. This will achieve the intents of Article 11 of the CRPD.

[27]Ibid
[28]Ibid
[29]Teddy Odira, Drowning in Neglect: How Floods in Kenya Unveil a System of Corruption, Inequality, and Human Rights Violations, 2024
[30]Constitution of Kenya (2010), Article 2(6)

Achieving the full inclusion and empowerment of persons with disabilities requires concerted efforts from governments, civil society, businesses, and communities to remove barriers, promote rights, and ensure that Persons with disabilities can fully participate and contribute to society on an equal basis with others.

Training of individuals on how to curb the effects that come with disasters should also be emphasised. To reduce vulnerability, persons with disabilities too should undergo the training without discrimination. Lastly, Article 27 of the Constitution of Kenya on equality before the law and the same reiteration in the CRPD on equality before and under the law provides for differential treatment to achieve substantive equality. This mechanism will see persons with disabilities given special consideration to achieve the envisaged equality in the law. It is high time then, that the government considered this before ordering evacuation, demolishing structures and neglecting the lives of those living in slums like Mukuru Kwa Njenga.

6.0. Conclusion

Floods that hit Kenya in 2024 led to loss of lives and properties. The most vulnerable persons were older persons, the poor living in slums at the river banks and the persons with disabilities. Much has been said about the former two, but the issue with persons with disabilities has not come out. Although people with disabilities (PWD) are disproportionately affected by disasters, research on disability and disasters has remained scarce to date. It is without say that the persons with disabilities are mostly affected by the floods in their movements, access to facilities and even food. More research should be done in this area if we are to achieve the aims of the Constitution as well as international instruments that form part of our laws by dint of Article 2(6) of the Constitution. The current legal framework is not sufficient to ensure these rights are protected.

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[31]Ton, K.T., Gaillard, J.C., Adamson, C., Akgungor, C. and Ho, H.T., 2020. An empirical exploration of the capabilities of people with disabilities in coping with disasters. *International Journal of Disaster Risk Science*, 11, pp.602-614.

The dual mandate of the capital markets authority in relation to the rule against bias

By John Odalo

Abstract

Before the Popat & 7 Others v Capital Markets Authority case was decided in 2020, the dual mandate of the Capital Markets Authority (CMA) was a contentious issue frequently raised in lower courts. These courts often ruled that the CMA's power to investigate and enforce decisions could lead to bias or a reasonable apprehension of bias. The unique nature of the CMA's roles and objectives has sparked debates about whether these functions should be separated. Ensuring that securities regulators comply with due process rights while fulfilling their obligations under the Capital Markets Act remains crucial. However, a question still lingers: Have all the challenges been fully addressed? Administrative law's role in regulating securities has been extensively discussed, and reforms have been proposed herein.

Introduction

The law ensures justice by establishing procedures that guarantee that our claims will be treated in a manner that is similar to the claims of others, so long as their claims are similar to ours.[1] It is now well known that the conceptualization of law as a means to justice is best embodied in the idea of the rule of law.[2] Under the rule of law, government is essentially by law and not men.[3]

Capital Markets Authority is responsible for ensuring fair, efficient, and transparent functioning of the capital markets within their jurisdiction. Their primary objectives often include investor protection, maintaining market integrity, and promoting confidence in the financial system.

The law demands those who are entrusted with power to be accountable for their actions. One such instance is when the law requires that due procedure be followed when police officers conduct their investigation and prosecution. The

[1]Galligan DJ, Due process and fair procedures: a study on administrative procedures, Clarendon Press, Oxford, 1996.
[2]Migai Akech, *Administrative law*, Strathmore press 2016.
[3]Ibid.

Capital Markets Authority, unlike the Police officers not only perform investigation but also enforcement functions. It is by dint of Section 11(3) (cc) & (h) of the Capital Markets Act that the authority enjoys the dual mandate. It is for this reason that this paper posits that the chances of abuse of power are higher when the CMA is both the prosecutor and judge.

The general lack of confidence in the authority may also lead to constant appeals of its enforcement decisions. It is difficult in contemporary society to have confidence in a body when it exercises two distinct functions that determine the fate of a case. There are a lot of risks including conflicts of interest or even chances of bribery. It is due to such risks that it can be reasonably deemed that the dual mandate of the authority poses a potential risk to access to justice.

Just to buttress this position on the need for public confidence, consider the case of ***R v Sussex Justices, ex parte McCarthy*** where Lord Justice Hewart stated that Justice should not only be done but seen to be done. To the Court in the case of ***Aly Khan Sachu v The Capital Markets Authority [2019]***, Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might not be impartial. The court went on to further state that the importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.

Brief history of the Capital Markets Authority (CMA)

The Capital Markets Act was enacted in 1989 and it was referred to then as the Capital Markets Authority Act.[4] This legislation enabled the institutionalization of substantive government regulation. The Nairobi Stock Exchange was established in 1954. Earlier on, between 1954 and 1971, the Nairobi Stock Exchange (as it then was) had the mandate of regulating the securities market.[5] It still regulates the Securities Market today but as a Self-Regulatory Organization. In the period between 1971 and 1989, there was established a Capital Issues Committee (in 1971) which did not achieve much in terms of regulation. It was in 1989 that regulation by the Government through the Capital Markets Authority Fully Kicked off. The Capital Market Authority was then tasked with the obligation of promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya. Under the current legislation, the Capital Markets Authority is established under section 5 of the Capital Markets Act.

Goals and objectives of regulation of the financial market

Pursuant to the principles outlined by the International Organization for Securities Commissions IOSCO, the three primary goals of securities regulation are as follows:

- Protecting investors.
- Reducing systemic risks.
- Ensuring that markets are fair, efficient and transparent.[6]

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[4]Gakeri, Jacob K. "Regulating Kenya's securities markets an assessment of the capital markets authority's enforcement jurisprudence." (2012).
[5]Ibid.
[6]International Organization of Securities Commissions; Objectives and principles of securities Regulation, 2017.

These objectives are embodied in the Capital Markets Act which mandates the Capital Markets Authority with the duty to oversee the capital market. Just as with any other system of regulation, there is always a risk that regulatory tools may restrict the growth of any kind of market. Zeroing in on the Capital market, this paper has focused on how the Capital Markets Authority regulates the market in relation to adherence to due process requirements (especially on the rule against bias).

The contribution of regulatory failure and deregulation to the eruption of the global financial crisis is emphasized by the Financial Crisis Inquiry Commission.[7] This only emphasizes the point that regulation is very crucial in ensuring stability in the financial market, especially in preventing systemic risks. Deregulation has ever been tried and it did not end well despite the advantages promised by a free market.

Driven by insights that the market cannot regulate itself, states found greater justification for regulating the market. This created regulators such as the Capital Markets Authority to regulate the Market. A tough nut remains uncracked despite the advantage of regulation. On the one hand, the Objectives such as investor protection and safeguarding against systemic risks have to be met, on the other hand, the regulator has to maintain its legitimacy by complying to requirements such as ensuring due process is adhered to while accomplishing its mandate.

The strive for legitimacy

It is trite that most regulators value the legitimacy of their power and how it is perceived by the subjects.[8] Legitimacy aids a big deal in ensuring compliance by the subjects. It is crucial for subjects, in this case, the players in the Capital Market, to accept that a regulator has the right to regulate. Regulators strive to achieve legitimacy in a number of ways. One way is by trying to conform to legitimacy claims that are made on them; they can even seek to manipulate such claims; or they can selectively conform to claims from among their environments which may entail conforming to claims of those that will support them. One of the most effective ways of assessing the legitimacy of a regulator is through accountability mechanisms being put in place. Accountability claims should be directed at validating: efficiency, due process, democratic participation, and so on.[9]

The Court in ***Re Posyer and Mills Arbitration [1964] 2 QB 467*** contended that for the statement that a decision-maker has a duty to give adequate reasons for his or her decision and the reasons must not only be intelligible but should also deal with the substantial points that have been raised. It is therefore not enough to give a reason that the action was the right thing to do, the regulator ought to account for substantial and procedural issues such as adherence to due process.

One of the controversial areas that the authority has had to grapple with is the constant accusations and complaints of violation of due process. It is often due to the unique dual mandate given to the authority by the Capital Markets Act that it is susceptible to being accused of bias. The dual mandate in contention is the Capital Markets Authority is vested with both the powers of an investigator and an enforcer

[7]Imad A. Moosa, Good Regulation, Bad Regulation; The Anatomy of Financial Regulation, (Palgrave Macmillan 2015).
[8]Princeton University, *Legitimacy*, <https://pesd.princeton.edu/node/516 > Accessed 6/14/2024.
[9]Robert Baldwin, Martin Cave, Martin Lodge, The Oxford handbook of regulation, (Oxford University Press, 2010).

of the law. Superior courts frequently get visits from Litigants who are aggrieved by the decisions of the Authority.

It is often the case that the authority counters these assertions in two ways. The first way is by averring that the actions complained of were done to protect the interests of the investors. Secondly, it is provided for by statute (Capital Markets Act) that the CMA shall have both an investigator and enforcer of sanctions upon a finding of guilt. The weakness in the latter part of the justification is that the legislation does not provide clearly an extent to which the right to due process will be limited as required by Article 24 of the Constitution.

The Capital Markets Authority

CMA has a legal department which helps support the functions of investigation and enforcement whereby whenever legal issues arise relating to investigation and enforcement, the Investigation and enforcement department reverts to the legal department for assistance.

There are three core functions of the Capital Markets Authority, these are:

- Licensing and approval
- Supervision
- Enforcement.

The focus of this article is on the enforcement bit of CMA's function. Enforcement under the CMA is segmented into two processes. The first process is the investigation process which is then followed by the enforcement process.

The investigation and enforcement process

A complaint may be lodged to CMA and from there investigations commence and if some criteria and elements are met depending on the offence, then an enforcement process may start. As opposed to the normal criminal justice system where particulars of the offences are recorded in the chargesheets, Offences under the Capital Markets Act are recorded in a notice to show cause. Apart from receiving complaints and requests from other persons, Section 11 (3) h of the Capital Markets Act empowers the CMA to conduct investigations either on its motion.

On investigating its own motion, the Capital Markets Authority runs a surveillance system which shows how shares are being traded. It is through such surveillance systems that they perform daily oversight over securities dealers in the Capital Market. An instance of how this oversight mechanism has been used is when the CMA noticed abnormal trading transactions at the Kenol Kobil counter which happened before the announcement of the takeover of Kenol Kobil by Rubis in 2018. It is as a result of the aforementioned investigations and enforcement that an appeal was lodged in the case of ***Aly khan Satchu v Capital Markets Authority [2019] eKLR*** where the appellant alleged violations of principles of natural justice.

CMA on its own initiative embarked on an investigation of the irregular transactions that took place in order to establish whether there was insider dealing. Parties that are investigated by the Capital Markets Authority are often the key personnel (Section 2 of the CMA Act defines Key personnel) like the directors, CEOs or any other persons that perform the essential managerial functions.

In performing its enforcement duties, the CMA issues a Notice to Show Cause (NTSC) to an alleged offender after the investigation process is concluded. Upon a finding of guilt, the CMA can issue penalties, often in the form of fines or even banning of companies from the Capital market. Some of the instances of the enforcement are when the CMA fined the directors and auditors of the collapsed

Canadian Supreme Court

Chase Bank Kshs. 36,000,000 for financial misreporting and misuse of funds.[10] An insider dealing (insider dealing is an offence under the Capital Markets Act) case scenario worth noting is the one that occurred in 2019 whereby the CMA took the initiative to ban the CEOs of Kenol.[11] In exercising its enforcement functions, the CMA faces accusations of bias, it is therefore necessary to create insights on the same due to a gap in research on this area.

Nemo judex in causa sua esse
Before the recent decision in Popat & 7 others v Capital Markets Authority by the Supreme Court of Kenya, Courts have dealt differently with the conflict arising from the exercise of the dual mandate by the CMA. It is a general rule that an accused person has the right to an independent and impartial decision maker. The Supreme Court of Kenya was in agreement with this position as it was adopted in the case of George R Brosseau v Aberta Securities Commission (an equivalent of the CMA in Kenya) by the Canadian Supreme Court. In the aforementioned case, it was held that it was generally not allowed for members forming part of the adjudicatory panel to also be involved in the investigatory stages of a proceeding.

The Canadian Supreme Court insisted that this was just the general position. There was an exception to the effect that the CMA could still perform the roles of an adjudicator and a prosecutor at the same time. This was solely based on the nature of the functions by the commission and in our case, the Authority. The Canadian Court stated that:

> *"Administrative tribunals are created for a variety of reasons and to respond to a*

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[10]Nation Africa, <https://nation.africa/Kenya/business/cma-fines-director-auditor-of-collapsed-chase-bank-sh35m-3901678 >Accessed 12th June 2024.
[11]Business daily,<https://www.businessdailyafrica.com/bd/news/ceos-banned-in-kenol-insider-trading-scandal-2256644 > Accessed 12th June 2024.

variety of needs." In the case of securities commissions, that courts added, "By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act." It is based on this nature of the function of Such bodies that makes it necessary to enact legislations that allow for an overlap of functions which in normal judicial proceedings would be kept separate to achieve the efficiency required in the operations of the securities markets."

The primary essence of such an exception is to encourage expediency, considering the nature of functions conducted by the Capital Markets Authority. Under Article 47 fair administrative action also encompassed expediency, such need for expediency justified the integration of the conflicting roles granted to the Authority. In order to understand the issue at hand further, it is essential to have a grasp of how the courts have been handling this issue on the rule against bias over time. Jurisprudence on the Bias rule before the Popat case. The Popat case will later on be discussed.

Courts often expected CMA to delegate adjudicatory duties after they concluded investigations

Before the decision in the Popat case, it is evident from the various cases that have been analyzed herein that most courts rarely expected the CMA to perform both investigatory and adjudicatory roles. In the case of Earnest & Young LLP v Capital Markets Authority, the court was reliant on a finding that the CMA performed both adjudicatory and investigatory functions in order to quash the decision. In the instant case, this ingredient was lacking hence the court dismissed claims by Earnest & Young LLP. In the Court's view, Earnest & Young, the applicant had brought the case to court prematurely. The CMA had yet to perform the adjudicatory functions and therefore it was baseless and frivolous to assert that there was bias. The court opined that the CMA had the legal option of delegating the process of adjudication to some other impartial body and there was nothing to rule out that possibility. It is clear from the Court's view that it (the court) had some sort of a legitimate expectation that the CMA would later delegate the adjudication process to a different impartial body.

A totally different situation was in the case of Chadwick Okumu v Capital Markets Authority where the applicant's case was allowed. The court's stance in the first case on delegation to a different body was further entertained in the aforementioned case. In this case, there were actual manifestations of violation of principles of natural justice by the regulator(CMA). This finding was premised on the actions of the CMA to perform the investigation by questioning and seeking clarifications and later on instead of delegating, heard the case, made a decision and even intended to enforce the decision. What differentiates Chadwick's application from Earnest & Young's is the timing. Chadwick came to court at the time when the CMA had performed the investigation and enforcement process. This made it easy for the court to take note of the manifestations of the violations of the principles of natural justice.

In Aly Khan Sachu v The Capital Markets Authority [2019] eKLR the court took note of the drafter's intention under section 11A of the act which permits CMA to delegate any of its functions under the Act to:

(a) a committee of the Board;
(b) a recognized self-regulatory organization; or
(c) an authorized person.

The court in the ***Chadwick Okumu v Capital Markets Authority*** could have

delegated the duty of adjudication pursuant to section 11A to evade a petition on procedural impropriety. In ***Aly Khan Sachu***, the court went on to further state that the Capital Markets Act in Section 11A gave the CMA Board the discretion to delegate its functions to, inter alia, a "Committee of the Board." Such delegation may be revoked at any time and the delegation does not prevent the Board from performing the delegated function. In essence, the Board and its own committee may still carry out the same function simultaneously. Under Section 14(1) of the Act, the authority may appoint "Committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority and may delegate to any such committee such of its powers as the Authority may deem appropriate." To the court, Sub-section (2) had a mandatory nature in that it makes it mandatory for the Authority to establish:

(a) committee to hear and determine complaints of shareholders of any public company listed on an authorized securities exchange, professional conduct or activities of such securities exchange or such public company, or any other person under the jurisdiction of the Authority and recommend actions to be taken, in accordance with rules established by the authority for that purpose; and
(b) a committee to make recommendations with respect to assessing and awarding compensation in respect of any application made in accordance with rules established by the Authority for that purpose.

It is not the performance of the dual functions that is essential in making a decision on whether to quash a decision by the CMA. The test of bias is the most crucial in such determinations by the court. The performance of the dual mandate only exacerbates the chances of violation of the principles of natural justice. To further elucidate this, consider the decision of the Supreme Court in the Popat case that the dual mandate was constitutional and yet they still found the respondent to have been biased. This is what this paper seeks to address, the potential risk of the CMA being biased when performing the dual mandate of both an investigator and an adjudicator. It is therefore important to establish that there actually was bias or an apprehension of bias through a test for bias.

Aly Khan Sachu

The test of bias; the fair-minded observer

Still in the ***Aly Khan Sachu case***, the court found that Impartiality was fundamental to the legitimacy of public decision-making. The court went on to state that there was established a single test to determine applications for bias, this was the test of the fair-minded and informed observer. The court went on to state that:

> *"In this context, a fictitious or mythical person provides a vessel in which the courts can impart as little or as much knowledge*

as is required to provide context. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that "justice should not only be done, but be seen to be done."

This connotes that processes should not only be fair, but also appear to be fair. In this view, appearances are important because this is the only way a fair-minded observer can observe what truly transpires in the quest for justice. This is mainly because the fair-minded observer is a member of the public.

There have also been disputes on whether there should be actual bias or even a mere apprehension of bias was enough to convince the court to quash a decision by the Authority. I would adopt the court's sentiments in the famous Aly Khan Sachu case when it stated that:

"The ever-present duty of a decision maker to act fairly is seriously compromised where the decision maker is seen to be guilty of the three categories of bias, namely, actual bias, imputed bias and apparent bias."

The regulator, therefore having the powers of enforceable decision maker ought to consider assuring its subjects of a fair process. Apprehension of bias can come up when the subjects are not confident with the decision maker. It is thus essential at all times that Lord Hewarts statements guide regulators that justice should not only be done but seen to be done. This is in opposition to the mantra that justice be done even if the skies fall. It is not just a matter of accomplishing a common good of protecting the interests of an investor, the procedures towards attaining that common good also matter, especially when such a regulator is seeking legitimacy.

Popat & 7 others v Capital Markets Authority (Petition 29 of 2019) [2020] KESC 3 (KLR)

Brief facts and history of the case

In this case, Popat and the seven other petitioners were the non-executive directors of Imperial Bank Limited which was already under receivership. The bank, prior to it being placed under receivership had sought to issue a corporate bond to the public. They made an application to the CMA to have the bond listed by the Nairobi Securities Exchange. The CMA approved their application. Before they could issue the bond, Alnasir Popat came to realize certain anomalies in transactions that were conducted by the then-group managing director who had already died. These transactions were done in a concealed manner and amounted to a loss of billions.

The Bank had to be put under receivership by the CBK due to the irregularities and malpractices in the bank which exposed depositors, creditors and the Banking sector to financial risk.[12] On the same day the bank was put under receivership, the CMA instructed the Nairobi Securities Exchange not to proceed with the listing of the Bank's bond issue. The CMA, as the regulator of the Capital Markets issued a notice to show cause (NTSC) to the directors of the Imperial Bank, the petitioners in the case. The NTSC gave them 14 days to respond to seven allegations of negligence in the discharge of their mandate as the directors of the bank.

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[12]Business Daily,<https://www.businessdailyafrica.com/bd/corporate/companies/kdic-resumes-payment-to-imperialbankdepositors4492644#:~:text=Imperial%20Bank%20had%20been%20placed,for%20the%20payment%20of%20Sh3> Accessed 13th June,2024.

The hearing was to be done by the CMA's board. The Board comprised of the senior officials of the Capital Markets Authority. To the directors of the Bank, the composition of the board of the CMA could not guarantee them that their rights under Articles 47 and 50(1) could be protected. In other terms, they lacked confidence due to what they perceived to be a procedural impropriety. The High Court agreed with the directors when a petition was filed against the CMA. The High Court found that it would beat logic if the CMA was allowed to be an investigator and an enforcer in a matter where they had already approved the bond issue as merited.

The CMA appealed to the Court of Appeal which was of a contrary opinion to the High Court. The Court of Appeal, in allowing the appeal by the CMA, reiterated that the Capital Markets Act expressly allowed the overlapping functions of enforcement and investigation so long as the CMA is expected to make unprejudiced judgment on matters it has investigated. This decision was problematic in the sense that it expects the CMA to make unprejudiced judgements yet there are little or no accountability mechanisms to ascertain that they have complied with principles of natural justice.

The Supreme Court decision on the Popat case

The directors of Imperial Bank then appealed to the Supreme Court. The Supreme Court despite finding that the dual mandate accorded to the CMA was constitutional, it recognized the risk posed by such a peculiar mandate. The court stated that the principle of Nemo Judex in causa sua esse is blurred when one presides in the adjudication of one's cause or a process one has an interest in. The court went on to give an example of how a conflict of interest would arise. The court stated that a prosecutor, for example, would have an interest in the conviction of a suspect he hauls into court. It is a sane view prosecutor cannot purport to be a judge in the same case. There will be little or no confidence in such a judicial system.

The CMA will frequently find it difficult to prove that there was no bias on its part if it does not make amends on how it handles investigations and enforcement duties under Sections 11 (3) cc and h. The Supreme Court in this Popat case for instance found that there was actual bias despite it being a fortress to the idea of the dual mandate. The Court found that the bias was on the part of the CMA because it found them to have an interest in the outcome of the hearing they were seeking to hold. The question that then beckons is how to ensure that there is no interest in a matter by the CMA.

Just a glance at the objectives and functions of the CMA under the Capital Markets Act would show you that at the core of regulating securities is the objective of protecting the interests of an investor. At all costs, the authority may focus on this function of protecting the interests of an investor to the extent of disregarding essential procedures for attaining justice. To the CMA there is a possibility that they adopt the mantra that the end justifies the means, in other words, the interests of an investor should be protected at all costs. The Capital Markets Authority has an interest in every case that they will handle. That interest is referred to as the protection of the investor's interest.

There is a possibility that the CMA, having fixed its priorities on investor protection, may not be easily swayed by defences brought to it by alleged offenders. The Supreme Court of Kenya in **Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Another cited the Professor** Groves M. in "The Rule Against Bias" where it is stated that-

> "*… claim of actual bias requires proof that the decision maker approached the*

issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favor of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand.

How then can impartiality be achieved in order to have a system that exudes principles of natural justice? A possible way out of the tunnel is conferring the duties of adjudication to the Capital Markets Tribunal. The Capital Markets Authority can do the investigations and hearing of the cases can be done by the Capital Markets authority. This can be done for cases that appear to be contentious. For this proposal to be effective, certain reforms can be done to the Capital Market Tribunal to make it impartial and more suitable to handle offences under the Capital Markets Act. As discussed below, the tribunal can be an effective avenue of redress if properly constituted and granted autonomy.

The Capital Markets Tribunal

This tribunal is established under section 35A of the Capital Markets Act. It is the Cabinet secretary who appoints the members of the tribunal. The Cabinet Secretary can also remove a member of the tribunal for various reasons including misbehaviour. The independence of the tribunal is questionable, and it can therefore be apprehended that its investigation and enforcement may be tampered with in the first place.

In order to attain impartiality and independence, the Capital Markets Act can emulate certain aspects under the Kenya Information and communications Act (hereafter referred to as KICA). This is with regard to the provisions that are in relation to:

i) Appointment of the members of the tribunal.
ii) Removal of the members of the tribunal.

Appointment of the Members of the Tribunal

It is more persuasive to acknowledge the impartiality of the Tribunal set up under Section 102 of the KICA Act than the Tribunal set up under Section 35A of the Capital Markets Act. This stance is informed by a comparison of the two legislations whereby an inference can be drawn that due to a well-established procedure, the Communication and Multimedia Appeals Tribunal assures parties that it can be a fortress of justice by being impartial.

The procedure involved in the appointment of the members of the Communication and Multimedia appeals tribunal is designed in a way that enables it to achieve impartiality in the following manner:

a) Transparency under Section 102 (2) (b)

The Cabinet secretary in charge of information, communication and technology is mandated not only to issue a Gazette notice of the vacancy in the Tribunal but also to ensure that it is published in at least two newspapers of national circulation.[13]

b) Appointment done by a selection panel

The Cabinet secretary appoints a selection panel that has persons from different organizations to perform the vetting and selection of the members of the tribunal. The Cabinet Secretary does not appoint the Tribunal directly. This helps in achieving

[13]Kenya Information and Communication Act Section 102 (2)

impartiality of the tribunal which enhances the legitimacy and acceptance of its authority by parties subjected to it.

c) The nature of the selection panel

The Kenya Information and Communications Act, under Section 102 (3) provides a list of members fit to be in the selection panel. From the list, it can clearly be seen that the membership represent various interest groups thereby ensuring that the members selected do not just represent interests of particular groups only.

d) Dissolution of the panel under Section 102(14)

After the Tribunal is formed, the selection panel is dissolved. This ensures that after the three-year term of the tribunal membership elapses, there is a different selection panel to appoint new members of the tribunal.

ii) Removal of members of the Tribunal under Section 102 (16) (c)

Members of the Communications and Multimedia Appeals Tribunal can only be removed by the Cabinet Secretary if there is a recommendation by a tribunal set up for such removal. This provision is important because it can prevent the arbitrary removal of a member based on ambiguous grounds like misbehaviour.

If the Capital Markets Tribunal is to espouse principles of fairness, it has to show that it is capable of being impartial. Justice should not only be done but seen to be done. In the case of ***Royal media services and two others v Attorney General & 8 others [2014] eKLR*** the court cited Principle 11 of the access to airwaves, International Principles on Freedom of Expression and Broadcasting Regulation which required that there be independence of the bodies regulating the broadcast

Royal media services

sector and prohibition of interference with their activities and membership to be specifically provided for in legislation and where possible in constitutions. The various regulations of Media have complied with this principle by explicitly providing for appointment procedures in its legislation.

A comparison of the legislation establishing the Communications and Multimedia Appeals Tribunal and its counterpart establishing the Capital Markets Tribunal leads to an inference of urgent need for reform. The executive, through its Cabinet Secretaries, cannot fuse bodies performing judicial functions with the executive. The Capital Markets Act should be amended to ensure that the Cabinet Secretary referred to under section 35 does not appoint members of the tribunal directly. The removal of the members of the tribunal should also be procedural to prevent abuse of power.

Right to due process

Section 35A of the Capital Markets Act provides that the fundamental rights under the Constitution of Kenya would

be applicable. Subjects that are regulated by the authority are therefore entitled to the right to fair administration under Article 47 of the Constitution of Kenya. Under Article 47, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Furthermore, under Article 50 (1) of the Constitution, it is clearly stated that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, if appropriate, another independent and impartial tribunal or body.

Essential rights to be considered by the regulator

Right to privacy

It is well established that the right to privacy can be limited as per Article 24 of the Constitution of Kenya 2010. It is by dint of Article 24 that Section 35B of the Capital Markets Act limits the right to privacy. Offences under the Capital Markets Act necessitate the invasion of someone's privacy including their home and family affairs where required. The privacy of someone's communication may also be investigated or otherwise interfered with. Section 13C of the Act however guarantees that principles of the protection of personal data under the Data Protection Act will be adhered to. The drafters of the regulation did not provide how section 35B of the Capital Markets Act could be harmonised with section 13C of the same Act.

In as much as it is not in contention that the interest of the investor has to be protected at all costs, the peculiar treatment of cases under the realm of capital markets can obscure justice. This is because it gives a lot of powers to the Capital Markets Authority. This power should therefore be exercised with great caution. Just as the court stated in the case of **Aly Khan Sachu v The Capital Markets Authority:**

> *There may be some truth in the adage that 'power corrupts and absolute power corrupts absolutely'*

Conclusion

It is not advisable to throw the baby with the bathwater. It is not in contention that the Capital Markets Authority enjoys a great deal of power in terms of investigation and enforcement. Accepting that the dual mandate of the CMA is constitutional is one thing, accepting how those powers are exercised is another. The Supreme Court in the case of Alnashir Popat and 7 others v Capital Markets Authority made a finding on the constitutionality of the dual mandate. It did not, however, show how the CMA could eradicate its interests in a matter when it inherently has an interest in protecting the investor.

It also does not call for a celebration that the dual mandate saga has been settled by the Supreme Court. Lest we forget, it is important to note that by its design, the regulation of the Capital Markets is tailored in such a way that it is easier to infringe on people's rights. Particularly the right to a fair hearing.

The regulatory system is designed in such a way that it offers little or no guarantee that the limitations of a right will be justifiable. The CMA needs to exercise its powers with considerable caution since it enjoys a great deal of power. Summarily, the adage that 'power corrupts and absolute power corrupts absolutely' should be taken into account by the Capital Markets Authority. The CMA should thus strive to ensure that it shows its capability to be impartial in order to rekindle public confidence in its adjudication processes.

John Odalo Juma is a final year law Student at the University of Nairobi awaiting graduation in December.

Kenya's young voters have a dilemma: They dislike ethnic politics but feel trapped in it

PHOTO BY YASUYOSHI CHIBA/AFP VIA GETTY IMAGES

A protestor faces off with Kenyan police in Nairobi after the 2017 general election.

By Narrelle Gilchrist

By Amanda B. Edgell

By Sebastian Elischer

In elections and beyond, young Kenyans are an important political cohort. People between the ages of 18 and 35 make up about 30% of the population and nearly 40% of registered voters in the 2022 election.

According to World Bank estimates, almost 20% of young Kenyans were not employed or engaged in education as of 2019, a frustration that may drive their political views. The COVID-19 pandemic likely worsened the situation given lockdowns in 2020 and 2021.

None of the major political parties and alliances in the current election have put forward a clear vision for young people. Instead, the electorate has been treated to the traditional election campaign menu of implicit ethnic hostilities and the attendant fears of politically motivated violence.

In the country's last election in 2017, then

23-year-old university student Shikoh Kihika started a hashtag, #TribelessYouth, in response to hateful, discriminatory messages she saw on social media. In 2017, over a quarter of Kenya's population was on social media. It's likely that fake news and other online messages designed to stoke fear and ethnic resentment contributed to the violence witnessed in that election.

Kihika's call for unity among Kenyan youth was shared widely. However, a lasting change in behaviour is harder to detect.

Social media is again being used to spread divisive content in the run-up to the August 2022 election.
Some messages are designed to stoke fear and disrespect, creating a narrative that Kenyans need to defend their ethnic communities.

Do these tactics resonate with young Kenyans, or is there hope for a more "tribeless" political generation?

We decided to study the political attitudes of Kenyan students, particularly their views on the use of ethnicity in politics.

We found that most Kenyan students dislike ethnic-based politics in principle. However, the pressures of tribalism are difficult to ignore.

This suggests that the pattern of ethnic voting and violence in Kenya will be difficult to break, particularly while concerns about ethnic discrimination and exclusion persist.

The students we surveyed widely supported institutional reform aimed at increasing power sharing and inclusion in Kenya's government, but these changes may be hard to achieve.

What the youth say

Our survey of University of Nairobi students to gauge their views on democracy and ethnicity was done in August 2018.

We surveyed 497 students between the ages of 18 and 35 less than a year after the 2017 general elections. It's important to note that our results may have been coloured by the 2017 elections, and youth views may have changed since our survey. Also, the views of university students may differ from those of the youth as a whole.

Of the students we surveyed, 97% identified primarily as Kenyan, choosing their national identity over their ethnic one. One-third stated that ethnicity remained an important part of their daily life; 47% said it played a minor or no role.

Most (84%) agreed with a statement that tribal identities hurt Kenyan politics more than they helped. More than one student said:

Tribalism is killing us.
Many students felt, though, that ethnic discrimination negatively affected their lives and politics. Over a third (38%) stated that members of their group faced disadvantages because of their ethnicity.

That number rose to nearly half among students from the Luo ethnic group, who have been repeatedly denied access to the presidency. They are the base of support for presidential candidate Raila Odinga.

The number was greater than half for students from ethnic groups with historically even less political power, such as the Luhya, Kamba and Kisii.

Students' perceptions of discrimination reflected the common belief in Kenya that members of the president's ethnic group reap social and economic benefits. Many students stated that the Kikuyu and Kalenjin had advantages in society since, as one student put it, "the president and deputy come from there".

As a result, Kenyan youth feel pressured to participate in ethnic politics despite their stated dislike of tribalism.

One student stated:

The big fear is that if we do not look out for ourselves, no one will look after us. Accordingly, 40% of surveyed students agreed that having a co-ethnic in government was important to them.

Only 29%, however, admitted to listening to the political opinions of their ethnic or tribal leaders. This suggests that the youth accept that having a co-ethnic in power has important material benefits, while also acknowledging the dangerous effects of ethnic politics.

Thus, we have a mixed picture: Kenyan youth continue to engage in ethnic politics out of pragmatism. In their actions, they appear to be far from "tribeless", despite widespread resentment of this system.

Moving beyond ethnic politics

How a country like Kenya can move past ethnic politics is something scholars and policy practitioners have long tried to understand. We don't have many new answers from our research. However, Kenyan students echo many of the solutions proposed by scholars.

For example, students in our survey cited problems with Kenya's electoral system, in which the "winner takes all".

They suggested ways to increase power-sharing and inclusion, such as rotating positions between ethnic groups.

Kenyan university students have a sophisticated understanding of liberal democracy and the reforms necessary for it to overcome ethnic divisions. They also tend to support further constitutional reforms to create a less polarised system.

PHOTO BY MONICAH MWANGI/REUTERS

Police use tear gas to disperse protesters during a demonstration against planned tax hikes in Nairobi, Kenya, on June 20, 2024.

This explains why #TribelessYouth founder Kihika remains hopeful. She told us:

There is a huge number of youth candidates both on political party tickets and as independents. Additionally, young people in the civic space are on the frontline. However, as shown by the recently failed and polarising move to change the Kenyan Constitution – under the Building Bridges Initiative – agreeing on the details of reform is difficult. This is a result of conflict and distrust between self-interested political elites.

The article was originally published by The Conversation at https://theconversation.com/kenyas-young-voters-have-a-dilemma-they-dislike-ethnic-politics-but-feel-trapped-in-it

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The role of diplomacy and international law in Africa's SDG journey

By Janet Wavinya

Introduction

The pursuit of achieving the Sustainable Development Goals (SDGs) has gained urgency as Africa confronts mounting environmental, political, and economic difficulties. The 17 interconnected Sustainable Development Goals (SDGs), which were developed during the 2012 Rio de Janeiro UN Conference on Sustainable Development, have been a source of hope for countries all over the world, especially those in Africa, since they were adopted by the UN in 2015. By 2030, these targets ask governments, corporations, and people to work together to fight poverty, protect the environment, and promote peace and prosperity. In line with the 2030 Agenda for Sustainable Development, the SDGs offer a thorough road map for building a better and more sustainable future for everybody.

But putting these goals into practice will take a coordinated effort, with diplomacy and international law playing crucial roles. Using diplomatic channels and legal systems is crucial as African nations work to end poverty, protect the environment, and promote peace and prosperity by 2030. In light of Africa's heterogeneous socio-economic and political landscape, this essay aims to investigate how legislative frameworks and diplomatic outreach can spur advancement towards the SDGs. On

their path to sustainable development, African countries face a wide range of difficulties, from encouraging sustainable investment to managing intricate geopolitical dynamics. However, these difficulties also present chances for creative solutions and cooperative alliances that can spur significant change.

By critically analysing the role of diplomacy and international law in supporting Africa's SDG efforts, this essay aims to shed light on the pathways through which these tools can help overcome barriers and achieve sustainable development goals across the continent.

Evolution of the SDGs

The Millennium Development Goals (MDGs), the precursor to the Sustainable Development Goals (SDGs), were instrumental in shaping global development

Eradicating extreme poverty and hunger is a complex and multifaceted goal that requires coordinated efforts at local, national, and global levels.

and fostering international cooperation. The MDGs were established in 2000 following the Millennium Summit of the United Nations. During this summit, world leaders adopted the United Nations Millennium Declaration, committing their nations to a global partnership aimed at reducing extreme poverty and addressing various development challenges. This initiative set forth eight ambitious goals to be achieved by 2015:

1. Eradicating extreme poverty and hunger
2. Achieving universal primary education
3. Promoting gender equality and empowering women
4. Reducing child mortality
5. Improving maternal health
6. Combating HIV/AIDS, malaria, and other diseases
7. Ensuring environmental sustainability
8. Developing a global partnership for development

The MDGs primarily targeted key issues in developing countries with the support of developed nations, reflecting a donor-centric development model. Their focus was largely on meeting basic needs and services, with the primary objective of poverty reduction through economic growth and integration into the global trade system. While the MDGs were instrumental in making significant progress in many areas, it became evident that a more comprehensive approach was necessary to address the evolving landscape of global development challenges.

Recognising the limitations of the MDGs and the need for a broader framework, the United Nations initiated a process to formulate a new set of goals. This effort culminated in the United Nations Conference on Sustainable Development in 2012, which laid the groundwork for the development of the Sustainable Development Goals (SDGs). These goals were formally adopted in 2015, marking

Achieving universal primary education is a critical goal aimed at ensuring that all children, regardless of their background or circumstances, have access to quality education.

a shift towards a more integrated and ambitious global development agenda. The SDGs align closely with the African Union's Agenda 2063, a strategic framework for the socio-economic transformation of the continent.

The SDGs consist of 17 interlinked goals that address a wider array of issues than the MDGs, such as climate action, sustainable cities, responsible consumption and production, and peace and justice. They emphasise the interconnections between these areas and represent a universal call to action for nations, businesses, and individuals alike. The SDGs aim to combat poverty, safeguard the planet, and foster peace and prosperity by 2030, providing a comprehensive blueprint for achieving a better and more sustainable future for all.

One of the key differences between the MDGs and the SDGs is the latter's deep-rooted commitment to the principles of human rights, equality, and empowerment. The SDGs are more people-centered, with explicit commitments to equity, inclusion, and the empowerment of all individuals. They also promote partnerships across various sectors and levels, encouraging collaboration between governments, the private sector, civil society, and other stakeholders. This inclusive approach aims to ensure that the benefits of development are equitably distributed and that all segments of society are empowered to contribute to and benefit from sustainable development.

The SDGs place significant emphasis on inclusivity, aiming to "leave no one behind". They target the most marginalised and vulnerable populations and call for disaggregated data to ensure that no group is overlooked. This focus on inclusivity ensures that development efforts address the needs of all people, particularly those who are often left out of traditional development paradigms.

The transition from the Millennium Development Goals to the Sustainable Development Goals marks a critical shift in the global development agenda. While

the MDGs laid an essential foundation by addressing basic needs in developing countries, the SDGs expand upon this framework with a more comprehensive, inclusive, and integrated approach. This shift reflects the ongoing adaptation of international development goals to better address the complex and dynamic nature of global sustainable development challenges. By fostering collective responsibility and encouraging innovative solutions, the SDGs aim to create a more equitable and sustainable world for all by 2030.

Historical examples of diplomacy and international law supporting African development

a. The Lagos Plan of 1980

In order to support African economic and social development, the Lagos Plan of Action placed a strong emphasis on independence and group self-sustaining expansion. The Organisation of African Unity (OAU) established it in April 1980, and it acted as a guide for the development plan for the continent. It promoted a coordinated and planned approach to African development by combining diplomacy, international law, and regional collaboration.

The Lagos Plan of Action employed a comprehensive approach to leverage international law and diplomacy in order to accomplish the sustainable growth goals and promote African growth. In order to guarantee that African interests were represented and safeguarded on the international scene, the strategy placed a strong emphasis on Africa's active and coordinated participation in international economic discussions.

The strategy advocated for more financial aid and support to Africa from industrialised nations and international financial institutions. The goal of this diplomatic appeal was to obtain the required outside assistance to support Africa's domestic development initiatives. The strategy promoted the creation and fortification of organisations at the national and international levels that may assist in the mobilisation of financial resources, oversee environmental regulations, and promote scientific and technological advancement. By coordinating their policies and uniting their economies, the plan pushed African nations to achieve economic independence. It also emphasised how important it was to strengthen laws and law enforcement to safeguard the environment and promote sustainable development since doing so would guarantee that development initiatives are long-lasting and advantageous to the communities in which they are implemented.

Although the plan faced implementation challenges, it laid the groundwork for future regional economic integration efforts and highlighted the importance of African-driven development agendas.

b. New Partnership for Africa’s Development (NEPAD)

The main goals of the New Partnership for Africa's Development (NEPAD), a strategic framework designed to address the issues facing the continent, are to accelerate women's empowerment, promote sustainable growth and development, integrate Africa into the global economy, and end poverty. In order to establish alliances, obtain funding, and bargain for improved trade and investment conditions all crucial for promoting African development and accomplishing the SDGs NEPAD made use of international law and diplomacy.

NEPAD promoted substantial debt reduction to free up funds for development. It emphasised that African nations sought to achieve agreements that lessened the burden of debt and supported sustainable economic policies by taking part in

The primary goal of the Paris Agreement is to limit global warming to well below 2 degrees Celsius above pre-industrial levels, aiming ideally for a limit of 1.5 degrees Celsius. This is considered crucial to avoiding the most severe impacts of climate change.

international negotiations and collaborating with international financial institutions. This involved enhancing debt management techniques and holding discussions to overhaul the Highly Indebted Poor Countries (HIPC) programme.

Through the formation of alliances that assist Africa's development agenda and integrate African economies into the global economy, NEPAD also promoted the development of new ties with developed nations and multilateral organisations.

Across Africa, NEPAD has sparked a number of development initiatives that have enhanced governance, developed infrastructure, and stimulated economic growth.

c. Paris Agreement of 2015

The United Nations Framework Convention on Climate Change (UNFCCC) spearheaded a global campaign to battle climate change and expedite the actions and investments required for a sustainable low-carbon future, which culminated in the adoption of the Paris Agreement during the 21st Conference of the Parties (COP21) in 2015. The goal of the Agreement is to keep global warming substantially below 2°C over pre-industrial levels, with a target of 1.5°C. All nations are encouraged to participate in the Agreement, which acknowledges their unique capacities and shared but distinct obligations. Since African countries are among the most susceptible to climate change, they must have a voice and a stake in global climate policy.

A legally enforceable framework for climate action is provided by the Agreement, and it is essential to this end that all Parties make long-term commitments and maintain responsibility. The implementation of climate policies that can propel sustainable development in African countries is supported by this framework.

The Agreement clearly states that activities taken to combat climate change

are inextricably linked to sustainable development. Climate action is guaranteed to support targets like poverty alleviation, renewable energy, and sustainable economic growth by being in line with the Sustainable Development Goals (SDGs).

African nations have been involved in the Paris Agreement in a significant way. Many of them have created and implemented Nationally Determined Contributions (NDCs) that support sustainable development by concentrating on renewable energy, sustainable agriculture, and climate resilience.

d. The African Continental Free Trade Area (AfCFTA, 2018)

The historic African Continental Free Trade Area (AfCFTA) aims to promote economic integration and development by establishing a single market for goods and services throughout the continent, easing capital and human mobility, and facilitating trade. With 54 of the 55 countries that make up the African Union involved, it is one of the biggest free trade zones in the world. The African Continental Free Commerce Area (AfCFTA) seeks to increase intraAfrican commerce, industrialisation, job creation, and the competitiveness of African economies worldwide.

An important diplomatic accomplishment for Africa, the AfCFTA demonstrates the continent's dedication to economic cooperation and regional integration. It gives member states the legal foundation they need to lower tariffs, deal with non-tariff obstacles, and put trade facilitation policies in place. In order to establish a stable and open business environment that can draw in investment and promote economic growth, this legal framework is essential.

The AfCFTA has the potential to greatly aid in the accomplishment of the SDGs by promoting regional trade and cooperation, especially in the areas of economic growth (SDG 8), industry, innovation, and infrastructure (SDG 9), and decreased inequality (SDG 10). The pact encourages member governments to enact laws that foster social inclusion, environmental sustainability, and sound governance in order to further sustainable development.

Significance of diplomacy and international law

In order to achieve international cooperation which is necessary to meet the SDGs diplomacy plays a critical role. African governments can form alliances with other states, non-state entities, and international organisations through diplomatic engagement to exchange financial, technological, and intellectual resources. The legal frameworks that support these partnerships are provided by international law, which guarantees that agreements are upheld and that there is a foundation for addressing conflicts.

Finding sufficient funding is one of the main obstacles to reaching the SDGs. African nations can now access funding for sustainable development initiatives thanks to the frameworks for climate finance established by international law and agreements like the Paris Agreement. To negotiate these agreements and advocate for increased financial support from wealthy nations and international financial organisations, diplomacy is essential.

African nations can improve accountability and fortify their governance systems with the support of international legal frameworks like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which can strengthen their institutional frameworks, defend human rights, and encourage social inclusion all of which are critical for sustainable development by harmonising domestic legislation with international norms.

Challenges in utilising diplomacy and international law

The utilisation of Diplomacy and international law as vital tools for sustainable development is not without its obstacles;

The execution of international legal agreements and successful diplomacy are seriously hampered by political unrest and violence. Prolonged conflicts cause disruptions to development programmes, population displacement, and the diversion of resources from sustainable development initiatives to emergency response in many African countries. These difficulties make it more difficult for nations to carry out and uphold international accords as well as to participate in diplomatic activities.

The ability of national institutions to participate in diplomatic and international legal procedures determines their efficacy. Many African nations struggle with issues such as corruption, a lack of experience, and insufficient funding because of their underdeveloped institutions. These restrictions may make it more difficult for nations to impose laws, negotiate advantageous terms in international accords, and guarantee adherence to international norms.

African countries frequently have limited financial and technological resources, which makes it difficult for them to fully engage in international legal and diplomatic procedures. It can be prohibitively expensive to maintain diplomatic missions, take part in international conferences, and carry out international agreements. Furthermore, it may be difficult to comply with international standards and reporting obligations if there is a lack of technology infrastructure.

Due to the frequent unbalanced nature of the global economic system in favour of wealthier nations, African countries find it challenging to negotiate fair trade agreements and obtain advantageous terms in international finance arrangements. These disparities can lead to unfair exporting conditions for Africa, restricted access to global markets, and an excessive debt load, all of which can impede attempts to meet the Sustainable Development Goals.

Opportunities in utilising diplomacy and international law

Initiatives for regional integration, such as the African Union's Agenda 2063 and the African Continental Free Trade Area (AfCFTA), present major chances for African nations to strengthen their collective negotiating power, encourage economic expansion, and advance political stability. Through these frameworks, nations can coordinate diplomatic efforts, share best practices, and pool resources to push for improved trade and investment conditions internationally.

African nations can obtain vital money, technical help, and policy assistance by interacting with international organisations like the World Bank, International Monetary Fund, and United Nations. These collaborations are essential to tackling development issues and achieving the SDGs. In order to close capacity gaps, execute successful development initiatives, and improve overall development results, diplomatic actions can help acquire the required support.

International agreements that offer extensive legal frameworks to direct national policy and advance sustainable development include the Paris Agreement. African nations can improve social inclusion, environmental protection, and economic resilience by bringing their domestic legislation into compliance with international norms. Investments, better governance, and inclusive and sustainable development initiatives can all be attained through such linkage.

International law plays a crucial role in advancing Sustainable Development Goals (SDGs), which are a set of global objectives adopted by all United Nations Member States in 2015 to address various global challenges by 2030. These goals encompass areas such as poverty eradication, health, education, gender equality, clean water and sanitation, sustainable energy, climate action, and more.

Utilising cutting-edge financing techniques like public-private partnerships, green bonds, and climate finance can aid in raising the funds required to fulfil the SDGs. Securing these cash flows and guaranteeing their efficient utilisation need diplomatic initiatives. For example, green bonds allow governments and businesses to raise capital for projects that benefit the environment, and climate finance can help with adaptation and mitigation efforts. Through public-private partnerships, African countries can overcome resource restrictions and expedite progress towards the SDGs by mobilising private sector investment for infrastructure and development initiatives.

Conclusion

International law and diplomacy are crucial instruments for assisting African nations in achieving the Sustainable Development Goals. African countries confront many difficulties, such as uneven political systems, weak institutions, scarce resources, and global economic disparities, but they also have great prospects for development. Strong legal frameworks, creative finance methods, regional integration, and international collaborations provide the means to get past these obstacles and make significant strides in the direction of sustainable development.

African countries may effectively manage intricate geopolitical dynamics, encourage sustainable investment, and cultivate cooperative alliances to advance their development objectives by utilising diplomacy and international law. To create a more sustainable and fair future for everybody by 2030, governments, international organisations, the commercial sector, and civil society must work together. To achieve a wealthy and just future, African nations must continue to manage the complexity of global growth, which means making strategic use of diplomatic channels and legal procedures.

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Khat in Kenya: Why efforts to ban this popular stimulant are unlikely to work

PHOTO BY SIMON MAINA/AFP VIA GETTY IMAGES

A khat trader carries shoots for sale in Meru, central Kenya.

By Neil Carrier

Khat – the stimulant leaves and twigs of the plant Catha edulis – seemed to have secure legal status in Kenya despite being illegal elsewhere. It had been declared an official cash crop in 2016, and efforts were under way to formalise its mostly informal production and trade.

But debate about its legality was revived after Abdulswamad Nassir, the governor of Mombasa County at the Kenyan coast, used his executive powers to ban muguka, a variety of khat, in May 2024. This was on the grounds that it was bringing harm, especially to children. The ban also followed a trade dispute over levies charged by the county on muguka imports.

The situation is testing constitutional relations between the central government and the counties, as President William Ruto and other national leaders push back against the ban.

I have conducted anthropological and historical research into khat and other drugs, including a current project on cannabis.

This research suggests that khat prohibition in Kenya would be ineffective and counterproductive. It would be better to regulate khat's trade to minimise harm, while protecting the livelihoods dependent on it.

Khat

Khat consists of the leaves or tender twigs of Catha edulis, chewed for their stimulant properties. Cathinone, the main compound,

is similar to amphetamine. Its release is gradual in the chewing process, producing a milder effect than amphetamine in pill or powder form. The effects involve increased alertness, focus and feelings of wellbeing.

Khat is cultivated in several other countries, including Madagascar, Uganda, Yemen and Ethiopia. How it is cultivated varies. Khat produced in central Kenya's Meru is grown as trees, while in other places, such as Mbeere in Embu and in parts of Ethiopia, it's grown as a smaller shrub.

Khat has become an integral part of livelihoods in these Kenyan regions, bringing farmers greater returns than tea and coffee. Somalia is a key destination for Kenyan khat, with 19 tonnes shipped daily in 2022 and earning billions of shillings. Trade within Kenya has also provided revenue for thousands of retailers, transporters, and county and national governments.

The current Kenyan debate has highlighted the distinction between miraa and muguka. Miraa consists of longer stems, while muguka is sold as handfuls of leaves from the tips of the plant. Both have a long history of cultivation in Meru and Embu counties, respectively. Key to muguka's popularity is affordability, as handfuls are bought for a few coins, while miraa is pricier. This affordability has established muguka as a work boost and leisure pursuit for many across Kenya.

Views towards khat consumption are polarised. Some praise it as a source of sociability, and a part of culture and heritage. Others see it as an addictive "drug" linked to all sorts of harms. Research suggests moderate use has few medical harms, although there are problems associated with overindulgence. Khat is also associated with social harms, such as unemployment, although causality is unclear. For example, people might chew to pass the time when there are few opportunities for work, rather than not having work because they chew.

To ban or not to ban?

Khat has been banned in several countries, including the Netherlands in 2012 and the UK in 2014.

The argument is sometimes made that illegality elsewhere proves khat is harmful. However, little research underpinned bans in the US and Canada in the 1990s. In the UK, research was conducted in-depth a decade ago. Official advice based on the findings argued that a ban would be disproportionate. The UK government went against this advice when it banned khat.

Given the current debate in Kenya over whether to ban khat or not, it's worth considering what the consequences of a ban would be. Those promoting prohibition hope that a ban would get rid of khat. However, a comparison with cannabis suggests otherwise.

Cannabis is subject to harsh penalties in Kenya, including imprisonment and fines under the 1994 Narcotic Drugs and Psychotropic Substances Act, even for possession of small quantities. Still, cannabis remains widely smoked within Kenya. Many see smoking it as a socially and medicinally valuable practice, even though it's illegal and some people disapprove. Trade is vigorous as illegality increases its value and traders often have working relations with police who turn a blind eye to business in return for payments.

A khat ban would likely be similarly ineffective in curbing consumption, as was an attempted khat ban by the British in colonial times.

A ban would likely increase corruption and spur a thriving illegal trade. Chewers would still chew, as they continue to in the UK

In Kenya, khat has both cultural and economic significance. It's grown as a cash crop and plays a role in the livelihoods of many farmers. However, its use is not without controversy, as it has been associated with health issues such as dental problems, mental health issues, and social problems related to addiction.

and Netherlands. Measures to control khat would additionally drain state resources. And revenue from legal trade would be lost. Too many people see khat as a legitimate crop, commodity and item of consumption in Kenya for bans to succeed in eradicating it.

Beyond the current debate

No solution will be perfect and please all sides. But finding ways through regulation to encourage responsible khat trade and consumption, while protecting livelihoods, is surely the way forward. Some revenue from khat's trade could be earmarked for measures to boost employment opportunities and improve tough socio-economic conditions that often underlie problematic substance use.

This will require collaborative work between different parties and learning from experiences with other substances.

Alcohol is a useful comparison here. It is a substance associated with far greater harms than khat. Yet, it's a socially accepted part of leisure for many. It raises revenue and supports thousands of livelihoods.

Getting a balanced form of khat regulation won't be easy, and alcohol shows you cannot regulate away all problematic consumption. But this is a more pragmatic approach to dealing with khat than the utopian idea that a ban would simply eradicate the stimulant from society.

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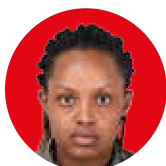
A strategic approach to Africa’s SDGs



By Michelle Gathoni

Overview

Acknowledging the critical role diplomacy and international law play in supporting African nations in advancing their sustainability agendas is imperative as we embark on this historic journey to end poverty, protect the environment, and usher in universal peace and prosperity by 2030. First and foremost, the Sustainable Development Goals (SDGs) were adopted by nations worldwide in September 2015 under the tutelage of the United Nations. Thus, the Millennium Development Goals (MDGs) were replaced by the Sustainable Development Goals (SDGs).[1] The MDG was criticised despite its utility for giving social outcomes precedence over infrastructure and energy, which were believed to be essential for growth.

On the other hand, a more inclusive strategy was used to accomplish the Sustainable Development Goals, acknowledging the link between global issues and the requirement to promote international cooperation to meet these objectives. Even while African nations

Treaties like the Convention on Biological Diversity support efforts to protect ecosystems and biodiversity (related to SDG 14 and SDG 15), while international agreements on pollution control and sustainable resource management contribute to SDG 6 (Clean Water and Sanitation) and SDG 12 (Responsible Consumption and Production).

have made significant strides toward accomplishing the SDGs,[2] there are still enormous obstacles to overcome, underscoring how vital diplomacy and international law are to advancing the process. Africans must use legal and diplomatic channels to solve essential development challenges and ultimately accomplish their SDG commitments, a testament to their resilience and determination.[3]

This essay will now focus more on how African nations might leverage diplomacy to get investments, etc., to overcome the

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[1]Stafford-Smith, M., Griggs, D., Gaffney, O. et al. Sustain Sci (2016). doi:10.1007/s11625-016- 0383-3..
[2]Sarah Lawan, An African take on the Sustainable Development Goals, October 13, 201.
[3]Rotimi Jaiyesimi, The Challenge of Implementing the Sustainable Development Goals in Africa: The Way Forward African journal p 13-18 https://www.jstor.org/stable/26357106 accessed 17th May 2024.
[4]Leena Srivastava, Strengthening multilateral diplomacy and sustainable development, December 2014 https://www.un.org/en/chronicle/article/strengthening-multilateral-diplomacy-and-sustainable-development <accessed 18th May 2024>

Diplomacy plays a crucial role in advancing the Sustainable Development Goals (SDGs) by facilitating cooperation, negotiation, and consensus-building among countries and other stakeholders.

obstacles preventing them from moving forward with building a more wealthy and sustainable future. In addition, the article will look at the intricate interactions between diplomacy and these urgent problems, highlighting the potential and difficulties of addressing them. As academic and policy professionals interested in international relations, diplomacy, and sustainable development in African nations, your role in supporting these efforts is crucial.

The role of diplomacy and international law in supporting African countries' efforts to achieve SDGs[4]

Diplomacy is the art and practice of conducting discussions between states. It is an essential tool for fostering cooperation and settling disputes between countries. Diplomats being the human resource, lead the pursuit of instruments, plans, and procedures to realize the 2063 African Union and the sustainability agenda.[5] This part of my essay allows me to discuss the importance of diplomacy and legal frameworks in great detail.

First and foremost, a significant aspect of diplomacy in achieving sustainable development in Africa is the promotion of partnerships and cooperation. This is by fostering diplomatic relations with other nations, international organisations, and non-governmental authorities to access resources, expertise, and technology needed to advance their developmental goals. Through bilateral and multilateral diplomacy, African nations can negotiate investment deals to support them in achieving the 17 SDGs through sustainable investment. This is where diplomats come in as they act as liaisons facilitating links with potential investors.[6]

Secondly, diplomacy can aid dialogue and negotiation on crucial issues such as poverty

[5]2030.
[6]Investing in the Sustainable Development Goals: The role of Diplomats, 2021. Investment advisory series, Series A number 9.

alleviation, health care, and gender equality, which are SDGs 1, 3, and 5 respectively. African nations can promote policies prioritising the SDGs and tackling shared issues that call for coordinated action by participating in diplomatic endeavours at regional and global fora.

Achieving the sustainability agenda also requires diplomatic efforts like peacebuilding, conflict resolution, and humanitarian measures.

Utilising International law is another important tool for African nations in advancing the SDGs. Adhering to international treaties, conventions, human rights agreements, and legal frameworks can help Africa better execute the Sustainable Development Goals and guarantee accountability. International law provides a common framework for addressing transnational issues, promoting good governance, and upholding the principles of equity and social justice. In summary, the role of diplomacy and international law in achieving the SDGs is indispensable.

Through partnerships, promoting dialogue, and upholding legal norms, African nations can overcome critical challenges, grab opportunities, and move closer to realising the transformative vision of sustainable development for all. Additionally, Africa can pave the way towards a more prosperous, inclusive, and sustainable future by effective diplomatic mechanisms and commitment to international law.[7]

Challenges faced by African countries in utilising diplomatic channels and legal mechanisms

Firstly, although as African nations we have made striving to achieve the Sustainable Development Goals (SDGs), and substantial challenges still need to be addressed. Diplomacy and international law are crucial in supporting African countries' efforts to achieve the SDGs.

However, the most problematic part is the present investment levels which need to be increased to meet the zealous social, economic, and environmental targets outlined in the 2030 agenda for sustainable development. In 2014, for example, UNCTAD estimated a yearly US dollar 2.5 trillion financial gap[8] in developing countries towards meeting the SDG agenda alone. This economic gap is still significant in developing countries, mainly Africans, as we struggle to keep up. Notwithstanding, the "decade of action" (2020-2030) is almost over. Not much has been done to address the significant challenge of finance.[9] Political instability,[10] weak institutions, and corruption continue to hinder sustainable investment, which requires a conducive environment to excel. Additionally, many African countries because of lacking transparency and accountability have deterred potential investors, interested in employing the agenda. At the same time, corruption and weak institutions have weakened the rule of law and impeded the creation of an environment favourable to investment.[11]

[7]Ibid.
[8]Investing in the Sustainable Development Goals: The role of Diplomats, 2021. Investment Advisory Series, Series A Number 9.
[9]Accessed 17th May 2024 >https://sustainabledevelopment.un.org/vnrs/
[10]"Political instability hinders progress towards achieving the SDGs related to ending hunger and poverty. The achievement of these SDGs relies on stable governance and a conducive political environment," Elvis Mugari, a Zimbabwean human rights activist," told IDN.
[11]https://indepthnews.net/africa-instability-slows-down-progress-in-sustainable-development/#: ~: text=Political%20instability%20hinders%20progress%20towards, human%20rights%20activist%2C %20told%20IDN. Africa: Instability slows down progress in sustainable development < accessed 19th May 2024>

In Kenya, for instance, violent anti-government rallies have impeded the progress of SDGs, that is access to justice (SDG 16), resulting in the deaths of six protestors and the injury often more in July. Opposition leader Raila Odinga had called for protests against the tax hike and rising living costs under President William Ruto's administration. According to Kakai Kisinger, he stated that a culture of impunity had been facilitated by the absence of accountability for the violation of human rights. Rotary Peace Fellow Kennedy Monari further noted a worrying trend in Kenya's political environment, with the current administration's pledge to achieve economic growth and alleviate poverty through job creation for marginalised groups like youths and women being threatened by the country's political instability puts the pursuit of SDGs at risk.[12]

Furthermore, COVID- 19 has been a showstopper toward realising the SDG agenda. This is because so many countries struggled economically, and even though the sustainability financing increased, it was for the benefit of those affected by COVID, not the agenda.[13] The problem lies in the need for coordination and coherence among us Africans. African countries need consistent policies, fragmented approaches, and limited coordination, weakening their collective diplomatic efforts and ability to leverage partnerships for sustainable development.[14]

Dependence on Foreign Aid is a significant problem as the over-reliance continues to constrain African countries' diplomatic autonomy and limit our ability to pursue sustainable development strategies that align with our unique needs. Investment in infrastructure, education, and other sectors critical for sustainable development requires substantial funding, but we need help to raise these resources as African countries. This is where diplomats find a seat at the table as this is their primary duty. Moreover, many African countries need more diplomatic representation and technical expertise to effectively engage in international negotiations and legal processes. As a result, African nations may need help to advocate for their interests and ensure that them concerns are considered in global decision-making.

Consequently, the unequal distribution of power and influence in the international system further exacerbates these challenges. African nations often have limited bargaining power in international negotiations and may need help competing with more powerful countries to shape global rules and norms. This can make it difficult for African nations to advance their development priorities and achieve the SDG targets.[15]

Let's focus on the positive aspect: opportunities continue to present themselves for us Africans to seize. Africans can use international law and diplomacy to address essential development concerns and achieve the SDG ambitions. We can secure advantageous trade agreements that support sustainable development through diplomacy, guaranteeing that social inclusion and environmental preservation coexist with economic prosperity.

International law can safeguard our environmental and human rights interests, promoting inclusive and sustainable development. We may hold international

[12]Ibid.

[13]Investing in the Sustainable Development Goals: the role of diplomats 2021. Investment Advisory Series, Series A Number 9, pg. 8-11.

[14]Investing in the Sustainable Development Goals: The role of Diplomats, 2021. Investment Advisory Series, Series A Number 9. Pg. 5-7.

[15]Rotimi Jaiyesimi, African journal p 13-18 https://www.jstor.org/stable/26357106

financial institutions responsible for their commitments to promote sustainable development by international law. We may also use international law and diplomacy to mobilize resources for sustainable development. For example, we may obtain the money required to invest in vital industries like climate action, affordable and clean energy, women empowerment and agriculture by arranging advantageous financing agreements with foreign financial institutions. Placing emphasis on diplomats as they are good negotiators and investor attractors.

In summary, although there are considerable obstacles for us to achieve the SDG targets through diplomatic channels, there are also chances to use diplomacy and international law to solve significant development concerns. We may overcome the obstacles and accomplish the SDGs by 2030 by strengthening diplomatic capacity, cooperative partnerships, practical policy coherence, and coordination. We must use these opportunities since they are at our disposal to create a more inclusive and sustainable future for Africa.[16]

Conclusion

In a nutshell, international law and diplomacy are one of the most crucial tools for helping African countries achieve the SDGs. Having chipped in as a protagonist in this essay, it gives me great joy to understand the importance of diplomacy towards achieving a sustainable Africa and the challenges that come with it. African nations can address significant advances by utilising legal frameworks and diplomatic channels. Even though as Africa we face many challenges, we can overcome them and work toward sustainable and beneficial development for both present and future generations. Finally, as a reader do you think achieving the sustainability agenda of 2030 is a fantasy or a potential reality?

Michelle Gathoni is a law student at the University of Nairobi, a certified Professional Mediator and a certified IBM Data Analyst.

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